92-930

Supreme Court, U.S.
FILED
NOV 30 1992
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No.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT ERLE QUIGLEY,

*Petitioner,*

*vs.*

THE STATE OF FLORIDA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

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November 30, 1992

Washington, D.C. • THIEL PRESS • (202) 328-3288

32 pp

## QUESTION PRESENTED

Whether a mistrial should have been granted after the State's law enforcement witness testified that he was unable to get a statement from Petitioner, thereby violating Petitioner's Fifth and Fourteenth Amendment rights, where the evidence of guilt was marginal and there is reasonable doubt that Petitioner would have been convicted in the absence of such improper testimony; and whether the failure to grant a mistrial in such circumstances denied Petitioner a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments.

## PARTIES TO THE PROCEEDING

1. Robert Erle Quigley, Petitioner.
2. The State of Florida.

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ARGUMENT:

A Mistrial Should Have Been Granted After The State's Law Enforcement Witness Testified That He Was Unable To Get A Statement From Petitioner, Thereby Violating Petitioner's Fifth and Fourteenth Amendment Rights, Where The Evidence Of Guilt Was Marginal And There Is Reasonable Doubt That Petitioner Would Have Been Convicted In The Absence Of Such Improper Testimony; And The Trial Court's Failure To Grant A Mistrial In Such Circumstances Denied Petitioner A Fair And Impartial Trial As Guaranteed By The Sixth And Fourteenth Amendments . . . . . 19

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## PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

COMES NOW, Robert Erle Quigley, Petitioner, and submits this Petition for Writ of Certiorari requesting that the Supreme Court grant a Writ of Certiorari, and reverse and remand the case to the District Court of Appeal, First District of Florida, with instructions to set aside the judgment and sentence of Petitioner and grant such other relief as it may deem appropriate.

## PROCEEDINGS BELOW

The Circuit Court of the First Judicial Circuit, in and for Escambia County, Florida, rendered its judgment and sentence of Petitioner. Appendix J at 25a; and Appendix K at 28a. The District Court of Appeal, First District of Florida, rendered its *per curiam* affirmance on June 3, 1992, and rendered its order denying a timely filed motion for rehearing on July 14, 1992. Appendix A at 1a; Appendix B at 2a. These decisions are not reported at this time.

## STATEMENT OF JURISDICTION

This Court has jurisdiction of this Petition for Writ of Certiorari pursuant to 28 U.S.C. sec. 1257. The *per curiam* affirmance of the trial court which was rendered by the District Court of Appeal, First District of Florida, on June 3, 1992, and its July 14, 1992, denial of rehearing were final judgments or decrees rendered by the highest court in Florida in which a decision could be had.

The underlying question presented is whether the opinion of the District Court of Appeal, First District of Florida, in affirming the refusal of the trial court to grant a mistrial contravenes the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

## CONSTITUTIONAL PROVISIONS AND RULES OF COURT

**The Fifth Amendment to the Constitution of the United States:**

> No persons . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . . .

**The Sixth Amendment to the Constitution of the United States:**

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

**Fourteenth Amendment to the Constitution of the United States, Sec. 1:**

> . . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

**Constitution of the State of Florida, Article 5, Sec. (3)(b):**

> JURISDICTION – The supreme court
>
> * * *
>
> (3) May review any decision of a district court of appeal . . . that expressly construes a provision of the state or federal constitution . . . or that expressly and directly conflicts with a decision of another district court of appeal or the supreme court on the same question of law.

**Florida Rules of Appellate Procedure, Rule 9.030(a)(2):**

> **Discretionary Jurisdiction.** The discretionary jurisdiction of the Supreme Court may be sought to review:
>
> (A) decisions of district courts of appeal that:
>
> * * *
>
> (ii) expressly construe a provision of the state or federal constitution.
>
> * * *

(iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law;

* * *

## STATEMENT OF THE CASE

On December 20, 1990, the State Attorney for the First Circuit of Florida filed an information against the Petitioner charging him with three counts of criminal activity: Count One, DUI-DUBAL Manslaughter; Count Two, Vehicular Homicide; and Count Three, DUI-DUBAL Damage To Person. Appendix D.

At Petitioner's trial on these charges, Florida Highway Patrol Homicide Investigator Steven R. Bevis testified for the State. During his cross examination, Bevis was being questioned about his investigative methods and conclusions. Specifically, part of the basis for Bevis' decision that the Petitioner was impaired was his assumption that Petitioner had not been able to stop his vehicle soon enough. In this regard, the following colloquy took place:

> Q. Now, you also say that you based your decision that Mr. Quigley was impaired on the distance it took to stop the truck and park, stop the truck, assuming that it stopped where it was parked from the point of impact up here to where you have marked on the exhibit, on this exhibit, I think you have said this was 170 feet?
>
> A. Yes, sir.
>
> Q. And you made your determination that he didn't attempt to stop, it took him this period of time to stop and, therefore, it's an excessive distance to stop, didn't you?

A. Yes, sir.

Q. Now, do you know – did you know then whether Mr. Quigley had attempted to stop the truck or did stop the truck prior to where Mr. Hawley came to rest?

A. No, sir.

Q. Did you attempt to make any determination in that regard?

A. I was not able to get a statement from Mr. Quigley. Appendix P at 107a.

Following this testimony, the jury was removed, and trial counsel for Petitioner asked for a mistrial on the basis that investigator Bevis' testimony was "evidence to the jury regarding his right to remain silent". Appendix P at 108a.

After a brief recess of the proceedings, the trial court determined that Petitioner's trial counsel had not invited investigator Bevis' response, and that the response was a comment on the Petitioner's right to remain silent. Appendix C at 3a; Appendix P at 109a.

The trial court took under advisement the request for a mistrial, and discussed with the prosecuting attorney and the Petitioner's trial counsel the issues of whether to give a curative instruction, and if so, the nature of such an instruction. Appendix C at 3a, 4a, 5a; Appendix P at 110a,111a.

Petitioner's attorney did not believe that a curative instruction would adequately protect the Petitioner, and he therefore continued to ask for a mistrial. He also objected to any curative instruction proposed by the State. Appendix C at 4a, 5a; Appendix P at 110a,111a.

*The prosecuting attorney took the position that the* curative instruction should not contain any explanation as to why the jury should disregard investigator Bevis' testimony because he believed it would "just draw attention to it". Appendix C at 4a, 5a; Appendix P at 111a.

Ultimately the trial court gave the jury the following instruction:

> . . . . Immediately before the recess during the examination of this particular witness, the witness made a comment in the – and the last comment the witness made I specifically ask you to disregard it, do not consider that comment in any way in your deliberations, strike it from your consideration completely. Thank you. Appendix C at 5a; Appendix P at 111a, 112a.

The motion for mistrial was taken under advisement throughout the proceedings.

Following the trial, Petitioner's counsel filed a written MOTION FOR MISTRIAL alleging that Bevis' testimony was highly prejudicial to the Petitioner because it was a comment by a police officer on the Petitioner's constitutional right to remain silent and prevented the Petitioner from receiving a fair and impartial trial. Appendix F.

The trial judge indicated his denial of Petitioner's request for mistrial on May 28, 1991, at the margin of the MOTION FOR MISTRIAL. Appendix F.

The Petitioner was granted a Judgment of Acquittal on Count Two, Vehicular Homicide, because there was no evidence that Petitioner operated his vehicle in any type of reckless manner. The granting of this judgment of acquittal is indicated at the margin of the Petitioner's MOTION FOR JUDGMENT OF ACQUITTAL. Appendix

H at 20a. This judgment of acquittal was granted after the jury had returned a guilty verdict on this charge although the State had failed to establish a *prima facie* case.

The jury also found the Petitioner guilty of Count One (DUI-DUBAL Manslaughter) and Count Three (DUI-DUBAL Damage to Person). Appendix J at 25a. As to Count One, Petitioner was sentenced to a prison term of twelve years, the balance of said term to be suspended after serving five years imprisonment. A five year probation period is to follow such imprisonment. Appendix K at 28a. As to Count Three, Petitioner was placed on probation for a period of five years, the said five years to run concurrent with his sentence under Count One. Appendix J at 26a.

Petitioner filed his NOTICE OF APPEAL to the District Court of Appeal, First District of Florida, on June 4, 1991. Appendix L.

He thereafter timely filed and served APPELLANT'S INITIAL BRIEF setting forth four appellate points, the fourth of which concerned the above-discussed testimony of investigator Bevis:

> THE COURT ERRED IN FAILING TO DIRECT A MISTRIAL IN VIEW OF THE ARRESTING OFFICER'S STATEMENT ON CROSS-EXAMINATION THAT "I WAS NOT ABLE TO GET A STATEMENT FROM MR. QUIGLEY". Appendix M at 33a, 57a.

The District Court of Appeal rendered its *per curiam* affirmance on June 3, 1992. Appendix A. It denied Petitioner's timely-filed motion for rehearing on July 14, 1992. Appendix B.

Following the decision of the District Court of Appeal, the trial court entered an ORDER STAYING EXECUTION OF SENTENCE, SETTING BAIL, AND CONTINUING PRESENT BOND which stayed the execution of sentence until this Court finally adjudicates this proceeding. Appendix N at 65a.

By order of Justice Kennedy, the time for filing this Petition for Writ of Certiorari was extended to and includes November 30, 1992. Appendix O at 67a.

As the opinion of the District Court of Appeal indicates (Appendix A at 1a) the appellate court gave no reasons for its decision and provided no legal analysis of the issues raised by Petitioner. Under Florida law, Petitioner had no further avenue of direct review in the courts of Florida.

Under the circumstances of this case, there would have been the possibility of discretionary review by the Florida Supreme Court only if the District Court of Appeal had *expressly* construed a provision of the state or federal constitution, or if it had rendered a decision which *expressly* and directly conflicted with the decision of another District Court of Appeal or of the Florida Supreme Court on the same question of law. Art. 5, Sec. 3(b)(3), Constitution of the State of Florida; Rule 9.030-(a)(2)(A)(ii) and (iv), Florida Rules of Appellate Procedure. Thus, the only direct review available to the Petitioner is a writ of certiorari from this Court to the District Court of Appeal.

Since the opinion of the Court below reveals no facts involved in this case, it is necessary to include in the appendix to this petition pertinent excerpts from the transcript of the testimony at trial.

The charges against Petitioner arose from the death of Harry James Hawley and the injury of his wife, Anita F. Hawley. Appendix D at 6a, 7a.

Anita Hawley testified at the trial that she and her husband were walking in an easterly direction along Fort Pickens Road at the time of the accident. It was getting "darker and darker", and the cars had their headlights on. Mrs. Hawley acknowledged that she and her husband were walking on the wrong side of the road with their backs to the traffic. They were both barefoot, and she walked on the sand immediately next to the road while her husband was "walking on the concrete". Appendix P at 71a, 72a and 73a.

She also admitted that she had expressed concern to her husband about walking with their backs to the traffic, and that this made her very nervous causing her to be "constantly looking back". Appendix P at 73a.

According to her testimony, at least four cars passed them, but she does not remember any of the cars flicking their headlights at them. She said that Mr. Hawley was not paying any attention, and that she had pulled him off the highway when three cars came by. Appendix P at 74a.

Before and at the time of the accident Mrs. Hawley was drinking. Appendix P at 68a, 77a. It was totally dark at this point. Appendix P at 75a.

At impact Mr. Hawley was still on the road. Appendix P at 78a. Mrs. Hawley was holding her drink in her right hand, and she was holding her husband's hand with her left hand. The truck's impact caused her to have bruises in her shoulder, shoulder area of her back, upper left hip, and forearm. She also suffered a sprained ankle.

However, she did not sustain any cuts. Appendix P at 77a.

After she was knocked down to the ground, she jumped up and ran looking for her husband. At this point, she indicated that she saw the pickup truck that had hit her and her husband, and that it had pulled into the lane of oncoming traffic. Appendix P at 78a. After she saw the pickup truck stopped in the oncoming traffic lane, she said that

> It pulled back over on the right, because there was a car meeting – oncoming there, and he pulled off to the right of the roadside. Appendix P at 79a.

Mary Ann Irvin is a motorist who saw Mr. & Mrs. Hawley walking on Fort Pickens Road shortly prior to the accident. When she saw them, they were walking in the roadway in her lane of traffic. Appendix P at 80a. Mr. Hawley was apparently near the center of Ms. Irvin's lane of traffic, and Mrs. Hawley was near the white line on the edge of the road. Appendix P at 81a.

According to Ms. Irvin, it was very dark in this area of Fort Pickens Road, a two-lane road, and oncoming traffic at night

> . . . hinders your distance of visibility in front of you, because if you look at the lights, it totally blinds you . . . Appendix P at 82a, 83a.

Ms. Irvin flashed her lights at them, but they did not move although there was nothing between her car and the Hawleys that would have prevented them from seeing her lights flashing. Appendix P at 83a, 84a. This upset Ms. Irvin because they weren't observing the laws by walking on the wrong side of the road, and she knew that

the situation was an accident waiting to happen. Appendix P at 84a.

Another witness, Terry Yvonne Schulze, was driving westwardly in a vehicle meeting Petitioner's vehicle. She witnessed the accident. Appendix P at 90a, 91a.

Ms. Schulze pulled over to the side of the road just west of where Mr. Hawley was lying. She got out of the car and went over to Mrs. Hawley, who was at her husband's body. Mrs. Hawley smelled strongly of alcohol. Appendix P at 89a.

At this time, Ms. Schulze saw another vehicle parked about fifty feet *west* of where Mr. Hawley's body was lying. She believes that this vehicle "pulled around" the scene of the accident and parked. She saw no other eastbound vehicles on Fort Pickens Road at that time. Appendix P at 90a, 91a.

Ursula Smith is another witness and motorist who saw Mr. & Mrs. Hawley walking in the eastbound lane of Fort Pickens Road at a time shortly before the accident. This upset Ms. Smith because it appeared to be so dangerous and because there was a walking path easily accessible to the Hawleys. Appendix P at 86a.

Shortly after the accident, Ms. Smith saw Petitioner running from his nearby townhouse back to the scene of the accident. She stayed at the scene at Petitioner's request because he wanted her to tell the police officers what she had seen. Appendix P at 85a, 86a. She testified that there was nothing to indicate that Petitioner was impaired at that time. Appendix P at 88a.

Ursula Smith's husband, Robert Daniel Smith, had the opportunity to observe the Petitioner for about ten to twenty minutes immediately following the accident.

Appendix P at 97a. Mr. Smith did not notice anything about the Petitioner's talk or actions that would suggest that he was under the influence of alcohol. Appendix P at 97a, 98a.

Joseph Simmons was with the Petitioner for approximately thirty minutes or longer at the accident scene. He testified that the Petitioner appeared to be "perfectly sober". Appendix P at 98a, 99a.

Escambia County Deputy Sheriff Roger Grice was one of two officers first on the scene of the accident. Appendix P at 101a. When he first arrived, Mrs. Hawley was hanging on to her husband. Deputy Grice could smell alcohol on her and was of the opinion that she was under the influence. Appendix P at 100a.

Although Deputy Grice was not close to the Petitioner, he did observe the Petitioner standing in front of his truck, and he saw nothing that would indicate that Petitioner was unsteady on his feet. He had no reason to believe that Petitioner was under the influence of alcohol. Appendix P at 100a, 101a.

Florida Highway Patrol Trooper William C. Smith was another law enforcement officer at the scene of the accident. He indicated that he conversed with the Petitioner at the scene and that he had walked with Petitioner. He indicated that there was nothing in his contact with Petitioner that would suggest to him that Petitioner's faculties were impaired. Appendix P at 92a, 93a.

However, Trooper Smith said that after driving Petitioner to the hospital and back, he "had a hunch" that Petitioner would go over the legal limit due to his breath. Appendix P at 93a, 94a.

Theresa Lynn White saw Petitioner shortly after the accident. Appendix P at 123a, 124a, 125a. She saw him

when he went to call the emergency 911 number and when she went over to the scene of the accident to stay with him until the law enforcement officers left with him. She did not see anything about his walk, talk, the way he stood or how he handled himself which would indicate that he was under the influence of alcoholic beverages. Appendix P at 123a, 124a.

William Allen Morphew saw Petitioner both shortly before the accident and when Petitioner came in to call 911. Morphew talked to Petitioner at his apartment and when he took him to pick up his truck. He did not notice anything that indicated Petitioner was under the influence of any substance. Appendix P at 124a, 125a.

Jean Bell, the Gulf Breeze Hospital medical technologist, was the individual responsible for taking the blood from Petitioner which was intended to be used in the blood alcohol test. She testified that she drew three vials or tubes of blood from the Petitioner, but she did not herself actually place any marks on the tubes. According to her, the Petitioner's blood samples were placed in two tubes with *yellow* tops and in one tube with a *purple* top. Appendix P at 94a.

Ms. Bell saw the Petitioner walking around in the laboratory. She also observed his conversation.

She stated that Petitioner requested that a doctor take his blood, but that he allowed her to take the blood when the trooper told him that he had no choice in the matter. She was close to the Petitioner, right at his arm, when she drew the blood from him.

Nevertheless, she did not observe anything that led her to believe that Petitioner's faculties were impaired or that he was under the influence of alcohol. Appendix P at 95a, 96a.

Hal Easter is the Florida Department of Law Enforcement Crime Laboratory supervisor who testified in regard to the blood samples which he tested for alcohol content. Mr. Easter indicated that he received two tubes of blood, not three as Jean Bell had testified. He also indicated that the stoppers on these two tubes were gray, not yellow and purple. Appendix P at 119a, 120a.

The blood which he tested indicated a blood alcohol level of .19 grams of ethyl alcohol per 100 milliliters, also known as a .19 percent blood alcohol level. Appendix P at 120a.

One of the State's most important witnesses was Florida Highway Patrol Homicide Investigator, Trooper Steven R. Bevis.

Trooper Bevis was the only witness other than Trooper Smith who smelled alcohol on Petitioner's breath. Appendix P at 101a. He said that he "detected a slight unsteadiness" when he saw Petitioner walking, but that there were no other "terribly noticable" signs of intoxication. Appendix P at 102a.

He also testified that the manner in which the accident occurred gave him a "very strong indication" that Petitioner was impaired:

> Q. Would you tell the jury everything that went into that decision on your part.
>
> A. First, both pedestrians were dressed in white. Secondly, at least two other drivers had observed them in the roadway and had been able to avoid them. Third, there was no evidence of any attempt to stop or avoid striking the pedestrians. And four, the distance between the point of collision and the distance to the final rest distance of 170 feet in the 30-mile-an-hour speed zone did not

indicate any kind of rapid reflexes or quick reflexes or attempt to stop. Appendix P at 102a.

However, Bevis indicated that he consulted with the State Attorney's Office before he filed the charges in the case because he had questions regarding two contributing causes of the accident: (a) Mr. and Mrs. Hawley's violation of the law by walking on the roadway with their backs to the traffic, and (b) the darkness or low light condition at the accident scene. Appendix P at 103a.

As related above, an important consideration in the mind of Trooper Bevis for the determination of whether Petitioner was impaired was that there was no evidence of any attempt to stop or avoid striking the pedestrians. The evidence he looked for were tire marks where Petitioner might have attempted to stop, alter his direction, or leave the roadway. He found no such tire marks. Appendix P at 104a.

However, Bevis did not determine if Petitioner's truck had an anti-locking brake system. He acknowledged that he did not know what such a brake system looks like but that he did know they prevent tires from skidding. Appendix P at 104a. He had no training in anti-lock brakes, although he had training in braking systems. Appendix P at 105a.

He also admitted that it was important to a traffic accident investigation to know whether a vehicle will make skid marks. However, he did not attempt to conduct such a test on Petitioner's vehicle or any other similar vehicle. At the time of trial, he did not know whether the subject truck would leave skid marks during sudden stopping. Appendix P at 106a.

Another important consideration in Trooper Bevis' opinion was the distance between the point of collision and where he found Petitioner's vehicle parked. Appen-

dix P at 107a. This distance led Bevis to believe that Petitioner took too long a period of time to stop. Appendix P at 107a.

It was during this questioning of Bevis' methods of investigation and conclusions that he made the comment about not being able to get a statement from Petitioner. Appendix P at 107a.

After the recess devoted to the issues raised by Trooper Bevis' comment and defense counsel's motion for mistrial, Bevis admitted that he made no attempt to determine whether Petitioner had stopped his vehicle "prior to the spot where Mr. Hawley came to rest". Appendix P at 112a. However he acknowledged that this would be a significant factor in determining whether Petitioner was impaired or under the influence at the time of the accident. Appendix 114a, 115a.

He also affirmed that oncoming traffic would be an important factor in determining whether Petitioner's reactions were appropriate. Appendix P at 114a. But the record does not indicate that he considered this factor in reaching his conclusions.

He said that the speed of Petitioner's vehicle was not involved in the accident and had no bearing on his opinion that Petitioner was impaired. Appendix P at 112a.

He did not give Petitioner the standard roadside test for alcohol impairment, although he was aware of the seriousness of the criminal charges that might be brought against Petitioner and although Trooper Smith could have assisted by conducting such a physical test on Petitioner. Appendix P at 116a, 117a, 118a, 119a.

He acknowledged that normally someone is videotaped when there is a question about their impairment or intoxication. However, Bevis did not have Petitioner videotaped. Appendix P at 119a.

James D. Anderson, a State consulting forensic engineer, testified that he ran tests on Petitioner's truck and found that it left no skid marks when making emergency-type stops at 35, 40 and 45 miles per hour. Appendix P at 121a.

Mr. Anderson summarized his expert opinion as follows:

> It is my opinion that Mr. Quigley was going down this road in a speed which exceeds the speed limit out tnere on the beach and that he had ample and sufficient time and distance to avoid it – hitting Mr. Hawley. Appendix P at 121a.

Mr. Anderson's opinion contrasts with the opinion of Trooper Bevis that speed had no bearing on the accident. Appendix P at 112a.

Mr. Anderson's opinion is also contradicted by the opinion of the Petitioner's accident reconstruction specialist, Bobby Vincent Smith. Mr. Smith believed that the Petitioner had reacted quickly and had come to a stop before reaching Mr. Hawley's body, and then pulled around the body. Appendix P at 122a. He pointed out that it was very difficult to see people at night when you are facing oncoming traffic, and that such oncoming traffic blocked the left lane of the highway so that the Petitioner could not go around the pedestrians. Appendix P at 122a.

Petitioner did not testify at the trial. Other than statements acknowledging driving the vehicle, no incriminating statements of Petitioner were admitted in evidence.

## REASONS WHY THE WRIT SHOULD BE GRANTED

The Fifth Amendment protection precluding comment on a Defendant's failure to give a statement is most important in cases such as this one where the evidence of guilt is marginal at best, and where there is a strong indication that the jury was prejudiced against the Petitioner.

Although there are decisions of the Supreme Court of Florida indicating conflict with the failure of the trial court to grant a mistrial in this case, no direct State review of the District Court of Appeal's *per curiam* decision is permitted under the jurisdictional strictures of the Florida Constitution. That constitution requires that a Florida district court of appeal decision *expressly* and directly construe a provision of the federal constitution, or *expressly* and directly conflict with a decision of another Florida appellate court, in order to open the avenue for discretionary review by the Florida Supreme Court. Fla. Const., Art. 5, Sec. (3)(b).

The decision below conflicts with the rules set forth by this Court in *Chapman v. State of California,* 87 S.Ct. 824 (1967), and its progeny. If cases of this type are not reviewed by this Court, it will allow the district courts of appeal in Florida to avoid or ignore important but difficult federal constitutional questions without threat of further direct review. Stated differently, in the absence of review by this Court, Florida district courts of appeal will be able to effectively preclude review by either the highest court in Florida or by this Court if they refuse to express reasons for decisions on important federal constitutional questions. This will undermine public confidence that there is an effective remedy for federal constitutional violations in the trial courts of Florida.

These are compelling reasons for this Court's exercise of its discretionary review jurisdiction.

## ARGUMENT

**A MISTRIAL SHOULD HAVE BEEN GRANTED AFTER THE STATE'S LAW ENFORCEMENT WITNESS TESTIFIED THAT HE WAS UNABLE TO GET A STATEMENT FROM PETITIONER, THEREBY VIOLATING PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS, WHERE THE EVIDENCE OF GUILT WAS MARGINAL AND THERE IS REASONABLE DOUBT THAT PETITIONER WOULD HAVE BEEN CONVICTED IN THE ABSENCE OF SUCH IMPROPER TESTIMONY; AND THE TRIAL COURT'S FAILURE TO GRANT A MISTRIAL IN SUCH CIRCUMSTANCES DENIED PETITIONER A FAIR AND IMPARTIAL TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS.**

The preliminary issue is whether Davis' comment that he "was not able to get a statement from Mr. Quigley" is an impermissible comment on Petitioner's right to remain silent. As has been indicated, the trial court determined that the testimony was indeed such a comment.

Much weight should be given to this finding. However, candor requires that Petitioner point out that the court utilized the "fairly susceptible" Florida test in making that determination.

The Florida rule is simply that a statement which is fairly susceptible of being interpreted by the jury as a comment on the accused's failure to give a statement or testify is to be treated as constitutionally prohibited. *State v. Kinchen,* 490 So.2d 21 (Fla. 1985); *State v. Thornton,* 491 So.2d 1143 (Fla. 1986).

What has been called the federal test in such matters was stated at *Samuels v. United States*, 398 F.2d 964, 968 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021, 89 S.Ct. 630, 21 L.Ed.2d 566 (1969): the test in determining whether such a transgression has occurred is whether the remark was manifestly intended or was "of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify".

Under the circumstances of this case, the testimony or comment of Trooper Bevis meets both the Florida "fairly susceptible" test and the federal test. Petitioner was present and physically able to give a statement to Bevis. This trooper and many other witnesses indicated that the Petitioner was at the scene for a substantial period of time after the accident, and that he accompanied law enforcement to the hospital for a blood test and then returned to the scene. Hence, the testimony that Bevis "was not able to get a statement from Mr. Quigley" would naturally and necessarily be taken by the jury to be a comment on Petitioner's silence or refusal to give a statement.

Since this comment or testimony of the law enforcement officer came during defense counsel's cross-examination, the next issue to be resolved is whether the attorney invited the prohibited testimony.

The trial court determined that Bevis' response was not invited by defense counsel. The written record supports this finding, and the trial judge was best able to evaluate the nature, tenor and tone of the questioning and responses. His factual findings should be given due deference.

It should be noted that the federal test does not require a showing that Bevis specifically intended to impermissibly comment. It is only necessary to show that the testimony was "of such a character that the jury would naturally and necessarily" perceive it to be such a comment. *Samuels v. United States, supra,* at 968. However, it is reasonable to surmise that Bevis intended to draw attention to Petitioner's unwillingness to cooperate when defense counsel's incisive undermining of Bevis' investigative method and opinion is considered. Appendix P at 103a through 107a.

In short, Bevis' testimony falls within the constitutionally impermissible category, and it was not invited by Petitioner's counsel.

The trial judge attempted to remedy the constitutional violation with a curative instruction. But did this meet the prescription previously established by this Court?

In *Fahy v. State of Connecticut,* 84 S.Ct. 229, 375 U.S. 85 (1963), this Court considered the validity of a conviction where unconstitutionally obtained evidence was admitted during the trial. The Court stated:

> The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Id. at 84 S.Ct. 230.

Using this test, the Court determined that the illegal evidence was prejudicial and, therefore, not harmless.

In *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967), this Court again faced the issue of whether a criminal conviction could stand when constitutional error had occurred during the trial. It was held that

> . . . before a federal constitutional error can be held harmless, the court must be able to declare a

> belief that it was harmless beyond a reasonable doubt. *Id.* at 386 U.S. 24, 87 S.Ct. 828.

There the Court noted that there was little, if any, difference between this holding and the test stated in *Fahy, supra.*

Under this rule the Court has established precedent affirming criminal convictions where the *untainted* evidence of guilt was so "overwhelming" that any constitutional error was harmless. *Harrington v. California,* 395 U.S. 250 (1969); *Milton v. Wainwright,* 407 U.S. 371, 92 S.Ct. 2174 (1972); *United States v. Hasting,* 461 U.S. 499, 103 S.Ct. 1974 (1983). As Judge Bownes wrote in *Clark v. Moran,* 942 F.2d 24 (1st Cir. 1991):

> In the practical application of this standard, courts have found error to be harmless when the untainted evidence, standing alone, provided "overwhelming evidence" of the defendant's guilt. *Id.* at 27.

In *Clark v. Moran, supra,* the court further pointed out that it was the duty of a reviewing court to consider the evidence as a whole, weighing the effect of tainted evidence against the effect of that evidence which was properly admitted. 942 F.2d 24 at 27.

That was the method of analysis correctly used by the First Circuit in *Coppola v. Powell,* 878 F.2d 1562 (1st Cir.), *cert. denied,* 110 S.Ct. 418 (1989). In *Coppola,* the court reviewed the untainted evidence and determined that it did not constitute overwhelming evidence of guilt, and that therefore the admission of the tainted evidence was not "harmless error beyond a reasonable doubt." *Id.* at 1571.

In this case, the refusal to grant a mistrial and the District Court of Appeal's affirmance of that refusal

conflict with the rule and standards set forth above. Moreover, it conflicts with the Florida Supreme Court's directives as to the application of the *Chapman* harmless error test. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986) at 1138. Again, no direct review, discretionary or otherwise, by the Florida Supreme Court is available to Petitioner under the Florida Constitution.

As the courts found in *Coppola v. Powell, supra,* and *State v. DiGuilio, supra,* the error in this case is not "harmless" as defined by *Chapman* and its progeny. The evidence of Petitioner's guilt is anything but overwhelming.

Seven witnesses who had an opportunity to observe Petitioner after the accident indicated that they saw nothing that would indicate his impairment or intoxication. One of the seven was the medical technologist who took Petitioner's blood sample. *See* Statement of the Case.

Other than the blood alcohol test results and opinion testimony based on an incomplete, erroneous factual basis, the only evidence indicating Petitioner's impairment or having an illegal blood alcohol level is the testimony of Trooper Bevis that he "detected a slight unsteadiness on his feet" and that of both Bevis and Trooper Smith that they smelled alcohol on Petitioner's breath. Appendix P at 93a, 101a, 102a.

Moreover, the blood alcohol test itself is highly suspect. As previously related, there is a great discrepancy between Jean Bell's description of the tubes in which she put Petitioner's blood and the Florida Department of Law Enforcement witness' description of the tubes holding the blood which he analyzed. Appendix P at 94a, 95a, 120a.

Additionally, Trooper Bevis' opinion that the circumstances of the accident indicate Petitioner's impairment was severely undermined during his cross-examination when he admitted that he had not even considered the non-skid anti-locking brakes of Petitioner's vehicle. Appendix P at 104a, 105a. Nor had he considered that witnesses had seen Petitioner's vehicle stopped in the westbound lane at some distance short of where Petitioner finally parked it. And Trooper Bevis did not take into consideration the oncoming vehicle driven by Ms. Schulze, whom he had not questioned. Appendix P at 107a, 112a, 114a.

Moreover, although Bevis indicated that excessive speed was not a factor in the accident, the opinion of the State's expert, James D. Anderson, that Petitioner had sufficient time to avoid the accident was based partly on his opinion that Petitioner was exceeding the speed limit. Appendix P at 112a and 121a.

On the other hand, the opinion of the accident reconstruction specialist, Bobby Vincent Smith, was that Petitioner "reacted very fast to the situation and came to a stop prior to the body and pulled around". Appendix P at 122a. This opinion also took into consideration the oncoming lights and other factors revealed by the testimony but ignored by Trooper Bevis and Mr. Anderson.

When the accident occurred, Mr. and Mrs. Hawley were illegally on a dark roadway with their backs to the traffic. Mr. Hawley was in Petitioner's traffic lane, and his wife was holding his hand. Even Trooper Bevis was concerned about charging Petitioner under these circumstances. Appendix P at 103a.

Thus, it is clear that the evidence against the Petitioner in this case is marginal at best, and certainly not overwhelming.

It is also important that the jury's erroneous verdict of guilt as to Count Two (vehicular homicide through reckless driving) be considered. After the verdict, the trial judge granted a judgment of acquittal on this count. Petitioner's motion pointed out that there was *no* evidence of Petitioner's reckless operation of the vehicle. Appendix H at 20a.

Such a verdict in the absence of even a *prima facie* case is a strong indication that the jury was not impartial and fair in its analysis of the evidence. And it is reasonable to conclude that Trooper Bevis' testimony that Petitioner would not give him a statement about the circumstances of the accident helped to create that prejudice.

In summary, in light of the evidence and circumstances of this case, the State cannot meet the *Chapman* rule by showing that it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty in the absence of Bevis' impermissible comment on Petitioner's silence.

Thus, Petitioner's rights to due process of law and a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution have been severely violated by the failure of the trial court to grant a mistrial after the Fifth Amendment violation.

The failure of the District Court of Appeal to express its reasons for deciding the important federal constitutional issues raised by Petitioner should not be allowed to bar review by this Court. This is especially true since the Florida Constitution precludes further direct state

appellate review of these federal issues. *Fla. Const.*, Art. V., Sec. 3.(b)(3).

Without review by this Court, these Florida constitutional strictures allow for State summary justice on federal constitutional issues without possibility of direct review. This in itself raises issues of fundamental fairness and due process of law under the Fourteenth Amendment. It is respectfully submitted that this is another reason for this Court's review of the proceedings below. Cf. Justice Black's opinion in *Chapman v. California*, 87 S.Ct. 824 (1967) at 826.

## REQUEST FOR RELIEF

WHEREFORE, Petitioner requests that this Honorable Court grant the Writ of Certiorari, reverse the decisions of the District Court of Appeal, First District of Florida, and the trial court, and remand with appropriate instructions.

Respectfully submitted,

WILLIAM KEMPER JENNINGS
514 W. Green Street
Perry, Florida 32347
(904) 584-7400
*Counsel for Petitioner.*

November 30, 1992

## CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the District Court of Appeal, First District of Florida, have been mailed First Class, Postage Pre-paid, in accordance with Supreme Court Rule 29.3, to counsel for the Respondent, listed below, on this 30th day of November, 1992.

Wendy S. Morris, Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32399-1050

BY:

_____

WILLIAM KEMPER JENNINGS

92-930

Supreme Court, U.S.
FILED
NOV 30 1992
OFFICE OF THE CLERK

No.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT ERLE QUIGLEY,

*Petitioner,*

*vs.*

THE STATE OF FLORIDA,

*Respondent.*

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

WILLIAM K. JENNINGS
514 W. Green Street
Perry, Florida 32347
(904) 584-7400
*Counsel for Petitioner.*

November 30, 1992

Washington, D.C. • THIEL PRESS • (202) 328-3288

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## APPENDIX A

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA,

NOT FINAL UNTIL TIME EXPIRES TO FILE
MOTION FOR REHEARING AND DISPOSITION
THEREOF IF FILED

Case No. 91-1807

ROBERT ERLE QUIGLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Opinion filed June 3, 1992

Appeal from the Circuit Court for Escambia County
Michael Jones, Judge.

Antony E. Fiorentino, Pensacola, for appellant.

Robert A. Butterworth, Attorney General; Wendy S. Morris, Assistant Attorney General, for appellee.

PER CURIAM.

AFFIRMED.

BOOTH, BARFIELD and KAHN, JJ., CONCUR.

## APPENDIX B

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399
Telephone No. (904) 488-6151

July 14, 1992
CASE NO: 91-01807

L.T. CASE No. 90-5361-M

Robert Erle Quigley v. State of Florida
Appellant(s), Appellee(s),

ORDER

Motion for rehearing filed, June 17, 1992, is hereby DENIED.

By order of the Court

JON WHEELER
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Antony E. Fiorentino
Wendy S. Morris

James W. Rogers
Ernie Lee Magaha

/s/ Laurie Black
Deputy Clerk

[SEAL]

## APPENDIX C

## TRIAL COURT'S FINDINGS AND CURATIVE INSTRUCTIONS

[376] THE COURT: The Court finds it was not invited, that the questions as I have read are not capable of interpretation which would be that they somehow invited the response that this officer gave, I was not able to get a statement from Mr. Quigley. The question was did you attempt to make any determination in that regard, that is, whether Quigley had attempted to stop the truck or did stop the truck. Any number of responses could be given other than a comment on the defendant's right to remain silent. The response that was given, "I was not able to get a statement from Mr. Quigley," must be viewed in light of the test which has been enunciated in *State vs. Kinchen* reported at 490 So.2d 21 and *State v. Thornton* reported at 491 So.2d 1143 by the Florida Supreme Court and reaffirmed time and again. The test is whether that comment, the response of this officer, is fairly susceptible of [377] being interpreted by a jury as a comment on the defendant's failure to testify or right to remain silent. And in the context that it was given, I must find that it is fairly susceptible of being interpreted by the jury as a comment on the defendant's right to remain silent.

I sustain the objection. I will take under advisement the request for a mistrial, and I will consider the State or the defendant's request for a curative instruction, and if so, what you may suggest that a curative instruction would be. The State has requested it. Does the defense request it?

MR. FIORENTINO: I don't have a requested curative instruction, Your Honor. It seems to me – I don't have one prepared, obviously. I think the most we can do to minimize this would be just that the jury is instructed to disregard any response – any comment of the trooper regarding ability to get information from Mr. Quigley. I don't mean to phrase it that way. We're going to have to refine it. I don't think there is one in the standard jury. I don't believe there is.

THE COURT: There is a comment in the standard jury instructions as given only if the defense requests it which has to do with the defendant's exercise –

MR. FIORENTINO: Right to remain silent.

[378]THE COURT: – Right to remain silent . . Look it at the first paragraph of it.

MR. FIORENTINO: How are we going to tie this in with what has just transpired? Pete, do you want to come forward, please?

THE COURT: I simply have to advise the jury that the last response of the witness is to be disregarded, and not to consider it in any way whatsoever as any evidence in this matter or inference of guilt.

MR. FIORENTINO: My position is going to be on this – I guess it will have to be that it's – that it has vitiated this thing to the extent that I don't believe a curative instruction would be adequate. I will just ask for a mistrial. And whatever the State proposes as a curative instruction, I will object to it.

THE COURT: State, do you request a curative instruction, and if so, what?

MR. WILLIAMS: Well, I think any specific reason why to disregard it would just draw attention to it, so I just recommend that the jury disregard the last

answer of the witness and, of course, we wouldn't read it back.

THE COURT: Okay. The defendant is of the [379] opinion that no curative instruction would help. The State would request that I give none other than to advise the jury to disregard the last comment of the witness, and that's what the Court will do. Again, I have taken under advisement the motion for mistrial.

MR. WILLIAMS: Your Honor, is there another standard instruction not becoming a witness, but the right to remain silent. I seem to recall –

MR. FIORENTINO: That's one that has to be given when requested by the defense.

THE COURT: That's in the pretrial instructions.

MR. FIORENTINO: That's if requested, and we're not requesting any at this time.

(Jury present)

THE COURT: Thank you, ladies and gentlement, please be seated. Ladies and gentlemen, I apologize for the long delay. That 15-minute recess turned into almost an hour, and I certainly beg your indulgence. I was taking some time to study some matters of law, and I just appreciate that you gave me the opportunity to do that. At this time please listen carefully to what I'm about to say, and then we're going to move on and continue the trial in this matter. Immediately before the recess during the examination of this particular [380] witness, the witness made a comment in the – and the last comment the witness made I specifically ask you to disregard it, do not consider that comment in any way in your deliberation, strike it from your consideration completely. Thank you.

* * *

## APPENDIX D

Case Number 90-5361-M Arrest Date 11-16-90
Agency Number 90-331062809

1)DUI - DUBAL MANSLAUGHTER 2)VEH HOMICIDE
3)DUI - DUBAL DAMAGE TO PERSON

IN THE NAME AND BY THE AUTHORITY OF
THE STATE OF FLORIDA
IN THE CIRCUIT COURT OF
ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

ROBERT ERLE QUIGLEY

CURTIS A. GOLDEN, State Attorney for the First Circuit of Florida, prosecuting for the STATE OF FLORIDA, charges that ROBERT ERLE QUIGLEY, on or about September 29, 1990, at and in Escambia County, Florida, did unlawfully drive or be in the actual physical control of a vehicle while under the influence of alcoholic beverages, any chemical substance set forth in Section 877.111, Florida Statutes, or any substance controlled under Chapter 893, Florida Statutes, and was affected to the extent that his normal faculties were impaired, or with a blood alcohol level of 0.10% or higher, and by reason of such operation of the vehicle did cause the death of a human being, to wit: Harry James Hawley, in violation of Section 316.193-(3)3., Florida Statutes.

COUNT TWO: And your informant aforesaid, prosecuting as aforesaid, on his oath aforesaid, further information makes that ROBERT ERLE QUIGLEY, on or about

September 29, 1990, at and in Escambia County, Florida, did unlawfully kill a human being, to-wit: Harry James Hawley by the operation of a motor vehicle, to-wit: a 1988 GMC Pick-Up Truck in a reckless manner likely to cause the death of, or great bodily harm to another, by striking Harry James Hawley with his motor vehicle, in violation of Section 782.071, Florida Statutes.

COUNT THREE: And your informant afordsaid, prosecuting as aforesaid, on his oath aforesaid, further information makes that ROBERT ERLE QUIGLEY, on or about September 29, 1990, at and in Escambia County, Florida, did unlawfully drive or be in the actual physical control of a vehicle while under the influence of alcoholic beverages, any chemical substance set forth in Section 877.111, Florida Statutes, or any substance controlled under Chapter 893, Florida Statutes, and was affected to the extent that his normal faculties were impaired, or with a blood alcohol level of 0.10% or higher, and by reason of such operation did cause damage to the property or person of another, to-wit: Anita F. Hawley, in violation of Section 316.193(3)1., Florida Statutes.

## APPENDIX E

[Filed APR 17, 1991]

IN THE CIRCUIT COURT IN AND FOR
ESCAMBIA COUNTY, FLORIDA

Case No. 90-5361-M

Division

STATE OF FLORIDA,

Plaintiff,

v.

ROBERT ERLE QUIGLEY,

Defendant.

### MOTION TO SUPPRESS

Antony E. Fiorentino, attorney for Defendant, ROBERT ERLE QUIGLEY, moves to suppress all statements made by the Defendant to Officer Steven Bevis, the Homocide Investigating Officer, and would show:

1. That the statements were made to Officer Bevis and Trooper William C. Smith during the time that Trooper Smith was conducting the accident investigation of this accident, and while Officer Bevis was conducting the criminal homicide investigation. Any statements made by the Defendant to Trooper Smith or to Officer Bevis in the presence of Trooper Smith while the traffic investigation was ongoing are privileged under §316.066, *Florida Statutes. Elder v. Robert J. Ackerman, Inc.*, 362 So.2d 999 (Fla. 4th DCA 1978); *Nash Miami Motors, Inc. v. Ellsworth*, 129 So.2d 704 (Fla. 3rd DCA 1961); *West*

*v. State*, 553 So.2d 254 (Fla. 4th DCA 1989); *Tarver v. State*, 553 So.2d 258 (Fla. 2nd DCA 1989).

2. That the statements made by the Defendant to Officer Bevis were made prior to the Defendant being given his Miranda warning and consequently, are inadmissable. *Tarver v. State*, 553 So.2d 258 (Fla. 2nd DCA 1989).

/s/ Antony E. Fiorentino
Antony E. Fiorentino
FLORIDA BAR NO. 107845
105 South Navy Boulevard
Pensacola, Florida 32507
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motions have been furnished to Peter Williams, Esquire, Office of State Attorney, 190 Governmental Center, Pensacola, Florida 32501, by Hand Delivery, this 17th day of April, 1991.

/s/ Antony E. Fiorentino
Antony E. Fiorentino

## APPENDIX F

[Filed May 2, 1991]

IN THE CIRCUIT COURT IN AND FOR
ESCAMBIA COUNTY, FLORIDA

Case No. 90-5361-M

Division

STATE OF FLORIDA,

Plaintiff,

v.

ROBERT ERLE QUIGLEY,

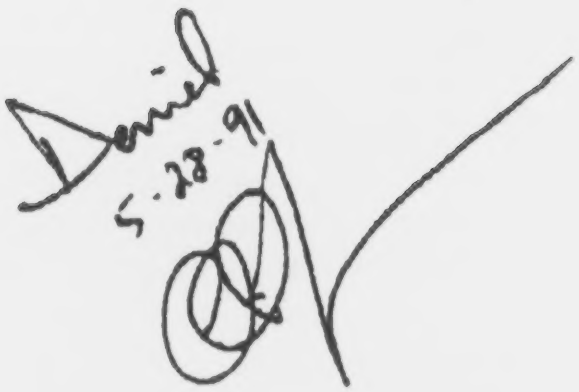
Defendant.

### MOTION FOR MISTRIAL

Antony E. Fiorentino, attorney for Defendant, ROBERT ERLE QUIGLEY, moves that the Court enter a mistrial in this action, and would show:

That the witness, Stephen Bevis of the Florida Highway Patrol, testified that he was not able to get information from the Defendant regarding the accident. The testimony of Trooper Bevis is highly prejudicial to the Defendant in that it is the nature of a comment by a police officer on the Defendant's constitutional right to remain silent. The statement by the police officer is in violation of the Defendant's constitutional rights. Because of the statement of Officer Bevis, the Defendant did not receive a fair and impartial trial, and substantial rights of the Defendant were prejudiced thereby.

/s/ Antony E. Fiorentino
FLORIDA BAR NO. 107845
105 South Navy Boulevard
Pensacola, Florida 32507
Attorney for Defendant



## APPENDIX G

[Filed May 2, 1991]

IN THE CIRCUIT COURT IN AND FOR
ESCAMBIA COUNTY, FLORIDA

Case No. 90-5361-M

Division

STATE OF FLORIDA,

Plaintiff,

v.

ROBERT ERLE QUIGLEY,

Defendant.

### MOTION FOR NEW TRIAL

Antony E. Fiorentino, attorney for the Defendant, ROBERT ERLE QUIGLEY, moves that the Court grant a new trial in this action, and would show that the following grounds are established:

That the Verdict in regard to Count One is contrary to the weight of evidence for the following reasons:

1. That the evidence established that the Defendant's driving did not substantially contribute to the death of the victim.

2. That the evidence established that the cause of the victim's death was his own recklessness and disregard for his own safety.

3. That the evidence established that the Defendant could not avoid the accident.

4. That the evidence established that the Defendant, under the circumstances, took proper evasive action.

5. That there is no evidence that the Defendant was driving while his normal faculties were impaired.

6. That the Court erred in allowing the blood alcohol results to be introduced in evidence, in that no proper chain of custody was established.

7. That the Court erred in allowing the blood alcohol results to be introduced in evidence, in that the State failed to show that the specimen was collected, preserved, and the tests were conducted in accordance with Florida law.

8. That the Court erred in allowing the results of the blood alcohol test to be introduced in evidence, in that the State failed to establish that the blood sample drawn from the Defendant was in fact the blood sample tested by the Florida Department of Law Enforcement's Chemist.

The Verdict in regard to Count Two is contrary to the weight of evidence for the following reasons:

There is no evidence that the Defendant operated his motor vehicle in a reckless manner. The evidence, on the contrary, established that the Defendant was properly operating his motor vehicle; that he took proper evasive action to avoid the accident, and that the accident was unavoidable.

That the Verdict in regard to Count Three is contrary to the weight of evidence for the following reasons:

1. That the evidence established that the Defendant's driving did not substantially contribute to the damage of the victim.

2. That the evidence established that the cause of the victim's damage was that she was intoxicated and her own recklessness and disregard for her own safety.

3. That the evidence established that the Defendant could not avoid the accident.

4. That the evidence established that the Defendant, under the circumstances, took proper evasive action.

5. That there is no competent evidence that the Defendant was driving while his faculties were impaired.

6. That the Court erred in allowing the blood alcohol results to be introduced in evidence, in that no proper chain of custody was established.

7. That the Court erred in allowing the blood alcohol results to be introduced in evidence, in that the State failed to show that the specimen was collected, preserved and tested in accordance with Florida law.

8. That the Court erred in allowing the results of the blood alcohol test to be introduced in evidence, and that the State failed to establish that the blood sample drawn from the Defendant was in fact the blood sample tested by the Florida Department of Law Enforcement's Chemist.

That the Court refused to give proper Instructions requested by the Defendant, to-wit:

Defendant's Requested Jury Instructions No. 1 and 2.

/s/ Antony E. Fiorentino
Antony E. Fiorentino
FLORIDA BAR NO. 107845
105 South Navy Boulevard
Pensacola, Florida 32507
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Peter Williams, Assistant State Attorney, 190 Governmental Center, Pensacola, Florida 32501, by U.S. Mail/Hand Delivery, this May 2, 1991.

/s/Antony E. Fiorentino
Antony E. Fiorentino
FLORIDA BAR NO. 107845
105 South Navy Boulevard
Pensacola, Florida 32507
Attorney for Defendant

## APPENDIX H

[Filed May 2, 1991]

IN THE CIRCUIT COURT IN AND FOR
ESCAMBIA COUNTY, FLORIDA

Case No. 90-5361-M

Division

STATE OF FLORIDA,

Plaintiff,

v.

ROBERT ERLE QUIGLEY,

Defendant.

### MOTION FOR JUDGMENT OF ACQUITTAL

Antony E. Fiorentino, attorney for the Defendant, ROBERT ERLE QUIGLEY, pursuant to Rule 3.380, *Florida Rules of Criminal Procedure,* moves for a Motion for Judgment of Acquittal on Counts One, Counts Two, and Counts Three, and would show:

1. There is no evidence that the Defendant was operating a motor vehicle other than his statements. Consequently, there is no proof of a corpus delicti other than the confession or admission of the Defendant. ". . . Corpus delicti must be prima facie established independently of the admission or confession of the defendant. . . . the admission may not be considered as part of the evidence going to make up the proof of the corpus delicti". *Farley v. City of Tallahassee,* 243 So.2d 161 (Fla. 1st DCA 1971).

2. In regard to Count One and Count Three, there is no evidence that the Defendant's driving contributed to the death or damage of the victims. On the contrary, the evidence established that the husband was walking approximately four and one-half (4-½') feet in Defendant's lane of traffic, and that his wife was walking alongside on the right hand white line of the pavement. They were walking on the wrong side of the road. The road is a two-lane road; it was dark; there was oncoming traffic, and the Defendant was attempting to stop his vehicle when the vehicle struck the husband, which in turn, caused the wife to be struck.

Two witnesses testified it was very difficult to see persons walking alongside the road, and it was even more difficult to see pedestrians if there was oncoming traffic. One of the witnesses, Mary Ann Irwin, testified that she was only able to see the victims because there was no oncoming traffic. Since there was no oncoming traffic, she was able to swerve into the oncoming lane to avoid these same victims.

With the exception of Trooper Stephen Bevis, all of the persons and police officers at the scene, or who came in contact with the Defendant immediately after the accident, testified that they had no reason to believe that Defendant's faculties were impaired. He appeared normal, and acted normal. Two witnesses testified that Defendant's faculties were not impaired when the Defendant left his home approximately twenty (20) to thirty (30) minutes before the accident.

Officer Bevis testified that had reason to believe the Defendant was under the influence of alcohol from the fact that he smelled alcohol on Defendant's breath; that the Defendant might have been a little unsteady on his

feet; that it took the Defendant one hundred seventy (170') feet to stop the vehicle after striking the pedestrian, and that because there was no oncoming traffic, the Defendant could have avoided the pedestrians by going around them into the westbound traffic.

Because of the assumed stopping distance, the assumed lack of oncoming traffic, and the assumed lack of evasive action, Officer Bevis was of the opinion that the Defendant did not react normally.

Officer Bevis testified, however, that if there was oncoming traffic, and if the Defendant had stopped his truck prior to the place where the husband came to rest, his opinion would be substantially changed in regard to whether the Defendant's reactions were normal, and that this would indicate that the Defendant reacted normally under the circumstances.

The victim's wife admitted that she knew that she and her husband were improperly walking on the roadway. She described their walking on the wrong side of the road as darkness fell as dangerous. She stated it became more and more dangerous as dark descended. Immediately prior to the accident, she said that she realized that they were placing themselves in great danger, and she advised her husband of the danger and that they should cross the road and walk in a proper manner. Her advice notwithstanding, the husband stated that there was no danger, and they continued to improperly walk in the roadway with their backs to oncoming traffic.

The evidence further showed that the victims had been drinking, with the wife being described as intoxicated immediately after the accident by the witness, Terry Scholtz.

The wife admitted that she and her husband were an accident waiting to happen. Mary Ann Irwin similarly testified that when she had to swerve to avoid them that she felt they were an accident waiting to happen. Moreover, she described how the victims did not respond to her flashing her bright and dim lights.

The victims apparently never saw, or realized, that a vehicle was approaching them in the opposite lane, nor that the Defendant's truck was coming from behind. The victims took no evasive action.

The testimony of Bobby D. Smith, Defendant's expert witness, established that under the circumstances, the Defendant could not have avoided the accident. The video tape shows that the victims were not readliy visible to the Defendant with oncoming traffic until the Defendant was within less than one hundred (100') feet from the victims. As that point at the legal speed limit, and with a normal reaction time, it was not possible for the Defendant to avoid striking the victims.

The evidence established that the Defendant was reacting and taking evasive action to avoid the accident when the victims were struck. The evidence establishes that the Defendant's reactions were normal. However, under the circumstances, there was no way in which the Defendant could avoid striking the victims.

In regard to the blood alcohol level, there is no competent evidence of record that the Defendant's blood alcohol level was in excess of .10%. The evidence established the fact that the Technician drew three (3) vials of blood blood from the Defendant. Two (2) of these vials contained yellow caps, and the third contained a purple cap. The blood was turned over to Officer W.C. Smith, who stated that he was given two (2) vials of

blood, both of which contained grey caps. The Chemist testified that when he opened the Highway Patrol kit, it contained two (2) vials of blood, both of which had grey caps. The chain of custody is fatally defective in that the vials of blood taken by the Medical Technician did not match the number and description of the vials described by the Chemist. Moreover, even assuming that the vial described by the Medical Technologist as having a purple cap was in fact a grey cap, this would only insure that there was a fifty-fifty (50-50) chance that a proper blood specimen was analyzed by the Chemist. Consequently, there is no competent evidence that the Defendant's blood alcohol level was .19% at the time of the accident.

In regard to Charge Two, vehicular manslaughter, there is simply no evidence that the Defendant operated his vehicle in any type of a reckless manner. There was no excessive speed, the accident occurred in Defendant's lane. He took evasive action. Reckless driving is discussed in *W.E.B. v. State,* 553 So.2d 323 (Fla. 1st DCA 1989):

> ". . . vehicular homicide cannot be proven without also proving the elements of reckless driving."[4] By the very fact that the offense of vehicular homicide has been described by the supreme court as involving a degree of negligence more than a mere failure to use ordinary care, the state must necessarily adduce evidence showing conduct at least sufficient to constitute reckless driving as that offense is defined in §316.019, Florida Statutes, as involving a 'willful' means 'intentionally, knowingly and purposefully,' and 'wanton' means with a 'conscious and intentional indifference to consequences and with knowledge that damage is likely to be done to persons or property.' Fla.Std. Jury Inst. (Misd.) (reckless driving.) . . ."

The facts in *W.E.B. III v. State,* supra, are summarized at Page 327:

> "Although it was nighttime, the weather conditions were clear. True, appellant was exceeding the speed limit, but he was not 'speeding' in the sense that other defendants in other vehicular homicide cases were speeding wherein the conviction was affirmed.[6] Further, notwithstanding the fact that appellant's Blazer did drive off the shoulder of the road, there is no suggestion that such incident occurred because of any impaired judgment on appellant's part from his having imbibed the beer. At most, as recognized by the trial court, appellant was in the victim's lane of traffic because he was overcorrecting from having driven off the shoulder of the road. That is evidence only of simple negligence and not of willful or wanton conduct.

The Court continued:

> ". . . it does not follow, however, that every fatality, regrettable as it may be, is accompanied by and results from conduct warranting a criminal conviction . . . Before one can be so condemned it must be established beyond and to the exclusion of every reasonable doubt that the defendant has been guilty of negligence of the character heretofore defined.
>
> [Footnotes omitted.] *Jackson v. State,* 10 So.2d 839, 840 (Fla. 1st DCA 1958). Moreover, in *Jackson* we recognized the well-established principle in this jurisdiction 'that criminal liability does not attach when the accused is by circumstances and conditions beyond his control and against his will, placed in the position and subjected to the conditions which resulted in the death with which he is charged.' *Id.* at 841. . . ."

/s/ Antony E. Fiorentino
Antony E. Fiorentino
FLORIDA BAR NO. 107845
105 South Navy Boulevard
Pensacola, Florida 32507
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Peter Williams, Assistant State Attorney, 190 Governmental Center, Pensacola, Florida 32501, by U.S. Mail/Hand Delivery, this May 2, 1991.

/s/ Antony E. Fiorentino
Antony E. Fiorentino

## APPENDIX I

[Filed May 28, 1991]

IN THE CIRCUIT COURT IN AND FOR
ESCAMBIA COUNTY, FLORIDA

Case No. 90-5361-M

Division

STATE OF FLORIDA,

Plaintiff,

v.

ROBERT ERLE QUIGLEY,

Defendant.

### AMENDED MOTION FOR NEW TRIAL

Antony E. Fiorentino, attorney for Defendant, amends the first Motion for New Trial to assert an additional ground, as follows:

"9. That the Court erred in allowing the results of the chemical blood test to be introduced into evidence, in that no law enforcement officer had probable cause to believe that a motor vehicle was driven by the Defendand while he was under the influence of alcoholic beverages."

/s/ Antony E. Fiorentino
Antony E. Fiorentino
FLORIDA BAR NO. 107845
Pensacola, Florida 32507
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Peter Williams, Assistant State Attorney, 190 Governmental Center, Pensacola, Florida 32501, by U.S. Mail/Hand Delivery, this 28th day of May, 1991.

/s/ Antony E. Fiorentino
Antony E. Fiorentino

APPENDIX J

[Filed June 4, 1991]

IN THE CIRCUIT COURT,
FIRST JUDICIAL CIRCUIT, IN AND FOR
ESCAMBIA COUNTY, FLORIDA

Division "M"

Case Number 90-5361-CFA4M-01

STATE OF FLORIDA

vs.

ROBERT ERLE QUIGLEY,

Defendant.

JUDGMENT

The Defendant, ROBERT ERLE QUIGLEY, being personally before this Court represented by Antony Fiorentino, his attorney of record, and having

(Check if Applicable)

- ☒ Been tried and found guilty of the following crime(s)
- ☐ Entered a plea of guilty of the following crime(s)
- ☐ Entered a plea of nolo contendere to the following crime(s)

| Count | Crime | Offense Statute Number(s) | Degree Of Crime | Case Number |
|---|---|---|---|---|
| 1 | DUI – DUBAL MANSLAUGHER | 316.193(3)3 | F2 | |
| 3 | DUI – DUBAL DAMAGE TO PERSON | 316.193(3)1 | F3 | |

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

**********

The Defendant is hereby ordered to pay the sum of ten dollars ($10.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of two dollars ($2.00) as a court cost pursuant to F.C. 943.25(4).

(Check if Applicable)

☐ The Defendant is further ordered to pay an additional two ($2.00) pursuant F.S. 943.25(8) (This provision is optional; not applicable unless checked).

☐ The Court hereby imposes a fine in the sum of $_____

---

NOTE: This page is to be completed ONLY where sentence is stayed and withheld or deferred until a later date.

Ct. 3 -

Imposition of Sentence Stayed and Withheld (Check if Applicable)

☒ The Court hereby stays and withholds the imposition of sentence and places the defendant on probation for a period of 5 years under the supervision of the Department of Corrections (conditions of probation set forth in separate order). Said sentence to run concurrent with ct. 1.

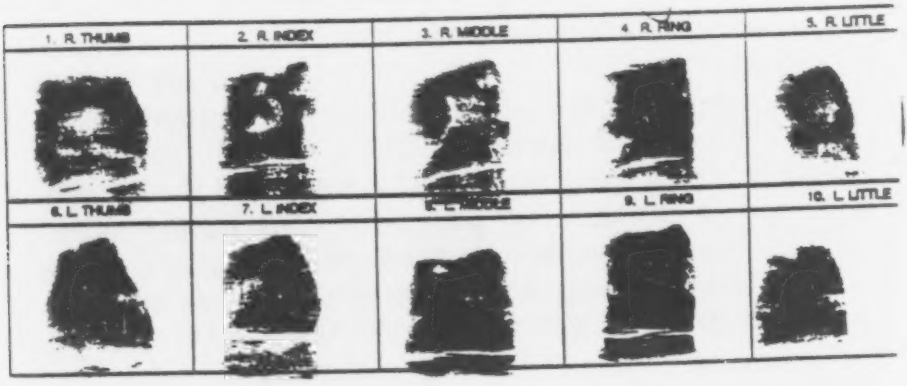
Sentence Deferred (Check if Applicable)

☐ The Court hereby defers imposition of sentence until _____ (DATE)

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's entitlement to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

/s/
JUDGE

FINGERPRINTS OF DEFENDANT




Fingerprints taken by:

/s/ Robert Brigham #635

Name and Title

DONE AND ORDERED in Open Court at Escambia County, Florida, this 4th day of June A.D., 1991. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, ROBERT ERLE QUIGLEY and that they were placed thereon said Defendant in my presence in Open Court this date.

/s/
JUDGE

## APPENDIX K

Defendant ROBERT ERLE QUIGLEY
Case Number 90-5361

SENTENCE
(As to Count 1)

The Defendant, having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by Law, and no cause being shown

(Check either provision if applicable)

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein.

IT IS THE SENTENCE OF THE LAW that the Defendant be commuted to the custody of:

☒ The Department of Corrections of the State of Florida. or

☐ The Sheriff of ESCAMBIA County, Florida

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

☒ For a term of 12 years

☐ For an indeterminate period of 6 months to __years.

If "split" sentence complete *either* of these 2 paragraphs

☐ Followed by a period of ____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☒ However, after serving a period of 5 years imprisonment in State Prison the balance of such sentence shall be suspended and the defendant shall be placed on probation for a period of 5 years under supervision of the Department of Corrections according to

the terms and conditions of probation set forth in a separate order entered herein.

****** SPECIAL PROVISIONS******

By appropriate notation, the following provisions apply to the sentence imposed in this section:

| | |
|---|---|
| Firearm— 3 year mandatory minimum | ☐ It is further ordered that the 3 year minimum provisions of 775.087(2) are hereby imposed for the sentence specified in this count, as the defendant possessed a firearm. |
| Drug Trafficking — mandatory minimum | ☐ It is further order that the _____ year minimum provisions of 893.135(1)( )( ) are hereby imposed for the sentence specified in this count. |
| Retention of Jurisdiction | ☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on record in open court. |
| Habitual Offender | ☐ The defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084-(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court. |
| Jail Credit | ☒ It is further ordered that the Defendant shall be allowed a total of 1 day credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional): |
| Consecutive/ Concurrent | It is further ordered that the sentence imposed for this count shall run ☐consecutive ☐concurrent (check one) to the sentence set forth in count ___ above. |

_____

Defendant ROBERT ERLE QUIGLEY
Case Number 90-5361

Consecutive/ Concurrent (AS to other convictions)

it is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run ____ consecutive to ____ concurrent with (check one) the following:

___ Any active sentence being served.
___ Specific sentences:_____

_____

In the event the above sentence is to the Department of Corrections, the Sheriff of ESCAMBIA County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of this Judgment and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

In imposing the above sentences, the Court further recommends _____

_____

DONE AND ORDERED in Open Court at ESCAMBIA County, Florida, this 4th of June A.D., 1991.

/s/
JUDGE

## APPENDIX L

[Filed June 4, 1991]

IN THE CIRCUIT COURT IN AND FOR
ESCAMBIA COUNTY, FLORIDA

Case No. 90-5361-M

Division

STATE OF FLORIDA,

Plaintiff,

v.

ROBERT ERLE QUIGLEY,

Defendant.

### NOTICE OF APPEAL

NOTICE IS GIVEN that Defendant, ROBERT ERLE QUIGLEY, appeals to the First District Court of Appeals, the Order of this Court rendered June 4, 1991. The nature of the Order is an Order adjudging the Defendant guilty on Counts One and Three in this action.

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Peter Williams, Assistant State Attorney, 160 Governmental Center, Pensacola, Florida 32501, by Hand Delivery this 4th day of June, 1991.

/s/ Antony E. Fiorentino
Antony E. Fiorentino
FLORIDA BAR NO. 107845
105 South Navy Boulevard
Pensacola, Florida 32507
Attorney for Plaintiff

**APPENDIX M**

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 91-1807

From the Circuit Court in and for
Escambia County, Florida
Case No. 90-5361

ROBERT ERLE QUIGLEY,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

APPELLANT'S INITIAL BRIEF

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ROBERT ERLE QUIGLEY

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## INTRODUCTORY NOTE

Appellant, ROBERT ERLE QUIGLEY, will use the following terminology in his Initial Brief:

ROBERT ERLE QUIGLEY will be referred to as "Appellant", or "ROBERT QUIGLEY", as required by the context.

STATE OF FLORIDA will be referred to as "Appellee", or "STATE", as required by the context.

"R–" refers to Record on Appeal.

"T–" refers to Transcript of trial proceedings.

## STATEMENT OF THE CASE

ROBERT QUIGLEY was charged on a three Count Information of DUI Manslaughter; Vehicular Homicide, and DUI Injury to A Person, respectively. The case was tried by a Jury. The Defendant was convicted of all three Counts.

The Defendant filed a Motion for New Trial and Motion for Judgment of Acquittal. The Defendant also filed a written Motion for Mistrial, inasmuch as the Trial Court had taken under advisement at trial Defendant's Motion for Mistrial.

The Trial Court granted Defendant's Motion for Judgment of Acquittal in regard to Count II, but denied Defendant's Motion for New Trial and Defendant's Motion for Mistrial.

Defendant was adjudged guilty of the DUI Manslaughter and DUI Injury to A Person. He was sentenced to imprisonment for a period of twelve (12) years; five to be served in the State Penitentiary, the balance of the sentence to be suspended, and the Defendant was placed on probation for a period of five (5) years. (R-984).

## STATEMENT OF THE FACTS

On September 29, 1990, on Pensacola Beach, Escambia County, Florida, at approximately 7:15 p.m., an accident occurred when a 1988 GMC vehicle struck Harry James Hawley and his wife, Anita F. Hawley. Harry James Hawley was killed. Anita F. Hawley suffered minor injuries. The road is two lane, unlighted and uncontrolled. The speed limit is thirty (30) miles per hour.

A paved walking path runs parallel and North of the road.

The accident occurred as the Hawleys were walking East in the *Eastbound* lane of Ft. Pickens Road. Mr. Hawley was approximately four and one-half (4-½') feet into the Eastbound lane. He was holding hands with his wife, who was walking to his right. The Hawleys had walked approximately one-third (1/3rd) of a mile in the Eastbound lane. They were returning to their townhouse, in which they had moved that day. Shortly before the accident, Mrs. Hawley was concerned about her and her husband's safety because it was dark, and they were improperly walking in the roadway with the traffic. Mrs. Hawley saw that her husband wasn't paying any attention, and that cars were getting close as they passed. Mrs. Hawley testified that she knew that she and her husband were in danger. Prior to the accident, she had pulled her husband off the highway when three (3) cars came by, and saw that they could be hit by an automobile without too much trouble. She warned her husband, and he replied, "Sweetheart, don't worry". (T-131-147; 156-159). The Hawleys had been drinking. Mrs. Hawley had enough to drink to make her intoxicated. Mrs. Hawley never saw the truck lights. Neither did she see the Corvette approaching from the opposite direction. The Hawleys took no action to evade the truck. (T-168-172).

Photographs depict the scene, and the Hawleys route of travel and are included in the Record.

Shortly before the accident, the Hawleys were passed by Mary Ann Irwin. Ms. Irwin flashed her lights up and down; the Hawleys did not move from the road. She proceeded to the opposite lane and went around the Hawleys. Ms. Irwin testified that when she saw the indi-

viduals, the man was about in the center of her lane of traffic. She had to act quickly to get around them. She stated she did not expect to see anybody walking down the road as the Hawleys were doing. She described the area as dark and unlighted; it is difficult to see anybody walking on the road and oncoming traffic hindered visibility. Ms. Irwin wondered why the people were not using the bike path. She thought they were dumb and it upset her they weren't observing the laws and were on the wrong side of the road. She was concerned that the situation was an accident waiting to happen. (T-113-125).

Mrs. Ursula Smith also saw the Hawleys as she drove in the *Westbound* lane. She similarly was upset that the Hawleys were not using the walking path. She thought the Hawleys' situation was "really dangerous". (T-282).

At the time of impact, a red Corvette driven by Terry Schulze was approaching in the *Westbound* lane. Ms. Schulze was approximately one hundred fifty (150') feet from the point of impact when she saw a flash in the lights of the oncoming vehicle. She slowed down, saw Mr. Hawley, pulled to the right hand side of her lane, and stopped. She saw Mrs. Hawley at Mr. Hawley's side. She noticed that a vehicle, which she believes was ROBERT QUIGLEY'S truck, was stopped approximately twenty (20') to thirty (30') feet west of Mr. Hawley. She saw the truck come around Mr. Hawley. She next saw the truck pulled off the road and parked to the East. (T-306, 307; 315, 316) Mrs. Hawley similarly saw the truck swing into the left lane, pull around her husband, and park. (T-159). Terry Schulze thought Mrs. Hawley was intoxicated and should not have been out on the road. (T-317).

The accident occurred approximately one-quarter (¼) mile from ROBERT QUIGLEY'S townhouse. ROB-

ERT QUIGLEY ran into his townhouse and called 911. (T-89-91). He was first seen at the accident after he returned after calling 911. (T-280). Mrs. Hawley testified that she could not see the person or persons in the truck. (T-146). Ms. Schulze did not testify regarding the driver of the truck. Other than ROBERT QUIGLEY'S statements to the Arresting Officer and other witnesses, there is no evidence that he was driving the truck.

ROBERT QUIGLEY was observed approximately twenty (20) to thirty (30) minutes before the accident by his girlfriend and a male friend. Both of them testified they did not see him drinking, and that he was not impaired. (T-92-94; 98-99).

After the accident, ROBERT QUIGLEY was observed by three (3) Police Officers; his neighbors; a friend; the Medical Technologist who drew his blood; and his brother. All stated he was not impaired, he was sober, or that he acted normally. (T-78; 217-218; 228-232; 267-269; 299-300; 731; 749). The only person to testify ROBERT QUIGLEY was "probably" impaired was the Homicide Investigator, Trooper Bevis. Trooper Bevis stated that there was a noticeable odor of alcohol on ROBERT QUIGLEY'S breath, and that he might have been "slightly" unsteady on his feet. (T-338; 407).

Investigator Bevis did an on scene investigation. Based on the accident scene, he was of the opinion that an impaired person was driving the truck, because the pedestrians were dressed in white; two other drivers had observed them on the road and had been able to avoid them; that there was no evidence of any attempt to stop or avoid striking the pedestrians, i.e., skid or tire marks, and that the distance between the point of collision and where the truck was parked was one hundred seventy (170) feet. He opined that in a thirty (30) mile an

hour speed zone, this distance did not indicate any rapid reflexes or quick reflexes, or attempt to stop. (T-354).

Officer Bevis on Cross-Examination testified that he was not aware that the truck stopped twenty (20') to thirty (30') feet short of the resting place of Mr. Hawley; that he was not aware that the truck was subsequently driven around Mr. Hawley and properly parked; that he was not aware that Terry Schulze was a witness to the accident, and that she was approaching in the oncoming lane; that he was not aware the 1988 GMC Truck had an antilocking braking system, which would prevent it from skidding and leaving tire marks on the road. Investigator Bevis did not conduct the physical tests on ROBERT QUIGLEY which are normally performed on an individual suspected of driving under the influence, nor did he have ROBERT QUIGLEY videotaped. (T-361-367; 393-397; 403, 404). Investigator Bevis acknowledged that had he known the truck had stopped prior to the point Mr. Hawley came to rest, it would have had a significant influence on his determination whether ROBERT QUIGLEY was impaired or not impaired. He continued, it would indicate ROBERT QUIGLEY'S reflexes were more normal than they appeared at "face value". (T-396).

Investigator Bevis directed that blood be drawn from ROBERT QUIGLEY for chemical analysis. ROBERT QUIGLEY was accompanied to the Gulf Breeze Hospital by Trooper W.C. Smith. Blood was drawn at the Hospital by a Lab Technician, Jean Bell. Ms. Bell testified she drew three (3) vials of blood, two vials being stoppered with yellow stoppers, and the third vial having a purple stopper. The vials were placed in a box within a box. (T-266, 267, 519, 520). Both boxes were sealed with seals signed by Ms. Bell. (T-266, 267). Eleven (11)

days later, the boxes were opened by a Chemist, Mr. Hal Easter, at the FDLE. Mr. Easter stated the boxes contained two (2) vials, both of which were grey stoppered. Chemical analysis of the blood showed a .19 blood alcohol level. (T-512, 522; 526-527).

The State and the defense presented expert testimony. Both experts testified that the lack of skid or tire marks was of *no significance* because of the braking system, the vehicle would not skid. Consequently, it would not leave skid marks. (T-475-476; 588, 608). Similarly, they both testified that the speed was between thirty-three (33) and forty (40) miles per hour. (T-428, 604). Officer Bevis stated that speed was not a factor in this accident. (T-389). The State's expert concluded that if the driver of the truck had reacted normally, he could have avoided the accident. (T-450). The Defendant's expert testified the Defendant's reactions were normal and that under the lighting conditions and with a car coming in the oncoming lane, the Defendant would not have seen the pedestrians in time to avoid the accident. (T-603-620). Defendants introduced a video taped reconstruction of the accident, and video taped experiments with the truck, showing it would not skid.

The Defendant was convicted of DUI manslaughter in regard to the death of Harry James Hawley; vehicular homicide in regard to the death of Harry James Hawley; and DUI injury to a person regarding Anita F. Hawley.

## SUMMARY OF ARGUMENT

### POINT I:

There is a fatal discrepancy regarding the blood taken from the Defendant and the blood tested by the Florida Department of Law Enforcement Chemist. The

number of vials taken and the color identification of said vials do not match the vials received and tested by the FDLE Chemist.

POINT II:

There is insufficient evidence to support the findings that the Defendant's normal faculties were impaired. All of the witnesses except the Investigator Officer, testified that the Defendant's faculties were not impaired, or were normal. The Investigating Officer's testimony regarding impairment was equivocal and based on assumed facts which the evidence showed were incorrect.

POINT III:

There is no evidence of Record other than the Defendant's admission that he was driving the vehicle, or that a person under the influence, or with an unlawful blood alcohol level, was driving the vehicle.

POINT IV:

That a witness made a statement reflecting on the Defendant's right to remain silent, and that such statement contributed to the Jury's Verdict.

ARGUMENT

POINT I:

THE COURT ERRED IN ADMITTING THE RESULTS OF A CHEMICAL BLOOD TEST, IN THAT THE STATE FAILED TO ESTABLISH A CHAIN OF CUSTODY SHOWING THAT THE BLOOD TESTED WAS THAT OF THE DEFENDANT.

The Defendant's blood was drawn by Ms. Jean Bell, a *Medical Technologist* who worked in the Laboratory at

the Gulf Breeze Hospital, Gulf Breeze, Florida. Counsel stipulated that Ms. Bell was qualified to draw the blood under §316.1933, *Florida Statutes*. She drew three (3) vials of blood, and immediately gave them to the Trooper. She testified that there were two (2) yellow topped tubes, and one (1) purple topped tube. She watched the Trooper label the tubes, put the chain of custody seals on them, and put them in the box, seal it, and she signed for them. (T-266, 267).

The blood samples were eventually received by Mr. Hal Easter, Supervisor of the Chemistry Section, Toxicology and Serology, Crime Lab, Florida Department of Law Enforcement in Pensacola, Florida. Mr. Easter stated that he received a sealed box to which the Lab had assigned No. 90-203520. ROBERT ERLE QUIGLEY'S name was written on the box, the inner plastic box, and also on the tubes themselves. There were two (2) tubes in the box. The stoppers on the tubes were grey. Mr. Easter did not document any markings on the inner or outer seals, not did he document the color of any seals on the tubes. (T-512, 513, 522). He received the specimens on October 9, 1990, eleven (11) days after it was drawn by the Medical Technologist. Mr. Easter analyzed the blood in only one (1) tube. (T-553).

Trooper W.C. Smith testified that he watched the Technician take the blood. She took two (2) vials. The vials were stoppered, with grey stoppers. After she drew the blood, she handed them to him and he wrote ROBERT ERLE QUIGLEY, the date and time that the blood was drawn. He affixed a red seal on the vials, on which he initialed and wrote the time. He then placed the vials in a kit and sealed the kit with white sticker labels which he had filled out and Jean Bell signed. The kit was placed in an outer box which was also sealed with white sticker

labels signed by Jean Bell. Four (4) seals were signed by Jean Bell. (T-519, 520).

Defendant objected to the introduction of the blood alcohol test results on the basis that the State had not established a proper chain of custody. (T-479, 524).

There is a fatal variance between the testimony of the Medical Technologist regarding the tubes of blood which she drew and saw placed in the box, as opposed to the vials received and tested by the Chemist. Ms. Bell testified she took three (3) vials of blood, two (2) of which were yellow stoppered; the third (3rd), purple stoppered. Mr. Easter received two (2) grey stoppered vials. (T-497).

The State has failed to show that the sealed boxes opened by Mr. Easter were sealed with the seals initialed by Ms. Bell. Mr. Easter at no time identified any writing on the seals, stating only that ROBERT QUIGLEY'S name was written on the outer box, the inner plastic box and on the blood tubes themselves. (T-521, 522). In fact, on pages 511 and 512 of the Transcript, Mr. Easter testifies as follows:

"Q. (By Mr. Williams) Mr. Easter, the blood test kit that you received, what day was it again?

A. I personally received it.

Q. Yes.

A. I received it on 10-9 of '90.

Q. It had case number what?

A. 90-203250.

Q. Okay. Did that have any markings on it identifying who the defendant was?

A. Yes, sir, it did.

Q. What did it have on it?

A. It had the name that is listed on our case tracking, which is Robert Erle Quigley.

Q. Okay. Any other markings?

A. I don't document any other marking other than name."

It is unique to the present situation that the Medical Technologist states she drew three (3) vials of blood, which were stoppered with two (2) yellow, and one (1) purple, stopper. It is unique that she watched the Officer label the tubes, put the chain of custody seals on them, put them in the boxes, and that she signed all four (4) white seals that were placed on the inner and outer boxes. (T. 267, 520). It is unique that Mr. Easter received two (2) grey stoppered vials. It is unique that Mr. Easter did not document Jean Bell's signature on the box seals. There is simply no evidence to authenticate that the blood analyzed by Mr. Easter is the blood drawn by Jean Bell.

The requirements for authentication and identification are set forth in §90.901 of the *Evidence Code:*

"Authentication or identification of evidence is required as a condition precedent to its admissability. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what it purports to be."

In regard to blood tests taken under §322, *Florida Statutes,* now §316, the Florida Supreme Court has written in *State v. Bender,* 382 So.2d 699 (Fla. 1980) that:

"the purpose of those portions of sections 322.261 and 322.262 which direct law enforcement to use only approved techniques and methods is to ensure reliable scientific evidence for use in future court

> proceedings and to protect the health of those persons being tested, who by this statute have given their implied consent to these tests."

and *State v. Strong,* 504 So.2d 758 (Fla. 1987), that:

> ". . . as stated in *State v. Bender* qualification requirements for Technicians are to protect drivers required to take blood tests . . .".

The conflicting testimony does not endure reliable scientific evidence was used in this Court proceeding, nor does the conflicting testimony support a finding that blood in the vial tested by Mr. Easter, was what it purports to be, i.e., the blood drawn from ROBERT QUIGLEY by Jean Bell.

POINT II:

THE VERDICT IS CONTRARY TO THE LAW AND THE EVIDENCE IN THAT THE EVIDENCE ESTABLISHES THAT THE DEFENDANT'S FACULTIES WERE NOT IMPAIRED AND THE BLOOD ALCOHOL LEVEL WAS IMPROPERLY INTRODUCED INTO EVIDENCE.

ROBERT QUIGLEY was observed by two persons within the hour prior to the accident: Theresa Lynn White and William Allen Morphew. Ms. White was ROBERT QUIGLEY'S girlfriend. She saw him not only before the accident, but went to the scene and remained there with him. Ms. White testified that prior to the accident he was not under the influence of alcohol. (T-92). Mr. Morphew testified he was with ROBERT QUIGLEY at approximately 6:30 p.m.. Allen Morphew was with ROBERT QUIGLEY approximately forty-five (45) minutes prior to the accident. He similarly testified that he really didn't notice anything that would make him think that ROBERT QUIGLEY had been drinking.

On Re-Direct Examination, he stated that he had seen ROBERT QUIGLEY when he was impaired, and he had seen him when he had been drinking to excess. (T-99).

After the accident, ROBERT QUIGLEY was observed by his brother, Clarence L. Quigley; his neighbors, Ursula Smith, and Robert Daniel Smith; three police officers; Deputy Michael Steel; Deputy W. Roger Grice; Trooper William Smith, and a Medical Technologist, Jean Bell. All testified either that ROBERT QUIGLEY was sober; that he was not under the influence of alcohol, or that he appeared to be normal in all respects. (T-76, 218, 231, 284, 200, 299, 750).

Trooper Smith conducted the Traffic Accident Investigation and was working with Investigator Bevis. (Investigator Bevis was conducting the Homicide Investigation.) Trooper Smith testified on Cross-Examination as follows:

(By Mr. Fiorentino:)

"Q. Officer Smith, now, you were with Mr. Quigley at the scene. You asked to get his driver's license, is that right?

A. Correct.

Q. And you turned his driver's license over to Trooper Bevis?

A. Correct.

Q. And then Officer Bevis – you walked across the road, you walked over to where Mr. Quigley was at Officer Bevis' request?

A. Correct.

Q. And then you brought Mr. Quigley from where his pickup was, I believe, is that where you found Mr. Quigley?

A. I don't know if he was by his pickup truck or or

(sic) not. I don't remember what was around him. There were several people around him and whatnot.

Q. All right. But at any rate, you and he walked across the road together?

A. Correct.

Q. And I believe you and Officer Bevis walked down the road to get away from the crowd?

A. Correct.

Q. So you had an opportunity to observe Mr. Quigley, how he was walking, standing, when he was talking to Officer Bevis and when he talked to you?

A. Well, we walked together, but I didn't actually watch him walk. It was dark and I had a flashlight, and I wanted to make sure he didn't stumble and fall.

Q. But you had an opportunity to see him?

A. Yes, sir, I saw him.

Q. And he was in your car with you, to the hospital?

A. Correct.

Q. You had conversations with him then?

A. Yes, sir.

Q. His speech appeared normal to you, didn't it?

A. Well, he was kind of upset. I couldn't – you know.

Q. You had no reason to believe, though, from his speech that he was under the influence of alcohol, did you?

A. Not at that time, no.

Q. You never formed an opinion that he was under the influence of alcohol, did you?

A. The only opinion that I came to at that time was that he had a very strong odor on his breath and that he probably would be over the legal limit.

Q. And this was after you had been at the hospital with him and you were driving back to the scene of the accident?

A. This was going to the hospital and coming back, the entire process that I was with him on a close-up basis.

Q. You formed your opinion, though, you thought – and actually you just had a hunch that he was going to run over the legal limit, didn't you?

A. I had a feeling that the longer I was with him, the stronger the odor was and from past experience –

Q. You had a hunch?

A. I had a hunch that he would probably go over.

Q. Okay. Now, you had nothing that you saw that evening, though, that led you to form an opinion that his faculties were impaired as far as his ability to walk, talk, stand and perform as he normally would?

A. No, sir.

Q. Now, at the hospital, the blood was drawn?

A. Correct.

Q. He had a conversation that he did not want a medical technician to take the blood?

A. Correct.

Q. He wanted to (sic) a doctor to take it?

A. Correct.

Q. You told him that the law provided that a medical tech named Jeannie Bell was authorized to take that?

A. Yes, sir.

Q. He understood that?

A. Yes, sir.

Q. He consented to it when you explained that to him?

A. Correct.

Q. Now, you're certified to do chemical breath tests, aren't you?

A. Yes, sir.

Q. And you have been certified to do this for how long?

A. Oh, probably as long as I have been on the patrol, about 12 years.

Q. 12 years. How many arrests have you made for DUI?

A. I couldn't give you an exact number. Quite a few.

Q. And you have run a lot of chemical tests in this case, a breath test, too?

A. Correct. . . .

Q. (By Mr. Fiorentino) Normally, if a driver of a vehicle is suspected of being under the influence or having an unlawful blood alcohol, a blood of .10 blood test provided the driver is not injured, physical tests are done on the individual, aren't they?

A. If a breath test is going to be performed, I would give what they call a field sobriety test.

Q. And if you were doing any type of DUI investigation, you would normally somewhere along the line give physical tests, wouldn't you?

A. I would, yes, sir.

Q. You would normally do a roadside test if the individual is not injured?

A. Correct.

Q. Now, a roadside test consists of a finger to nose test, I believe, is that correct?

A. Well, that's one of several that can be used.

Q. What are the various tests?

A. Okay. there is the finger to nose. We have the heel to toe. We have standard balance test. There is a horizontal gauge in the standard test. There is a one-leg standard. . . .

Q. (By Mr. Fiorentino) And the segments test, I believe is where you check the movement of the eyes with the flashlight?

A. You don't use a flashlight. You use the fountain pen.

Q. And you watch how the eyes track the pen?

A. Correct.

Q. And these tests are designed to tell the officer whether or not they suspect that the individual's faculties are impaired?

A. Correct.

Q. Now, did you run any of these tests on Mr. Quigley that evening?

A. No, sir.

Q. Were you asked to run these tests by Officer Bevis?

A. No, sir.

Q. Now, in addition, if an individual – and I'm talking about these physical tests now, in addition, if an individual is suspected of DUI, do you not normally videotape them in another set of series of tests?

A. If they are on a breath test, fail the field sobriety test, then they are placed under arrest and they are transported to the county jail where there is a video equipment.

Q. And then you run these same tests or similar tests again in front of the video camera?

A. Correct.

Q. And then in this particular case were any tests run, physical sobriety test, finger to nose, walking a line, heel to toe, balance test, were any of these run in front of a TV camera by you?

A. No, sir, not by me, no, sir.

Q. Do you know of any test being run on Mr. Quigley that evening in front of a video camera?

A. No, sir. . . ." (T-228-232; 233-234; 235-236).

The only person that testified that ROBERT QUIGLEY'S faculties were probably impaired was the Arresting Officer, Investigator Bevis. Trooper Bevis stated that he smelled a very noticeable odor of alcohol on QUIGLEY'S breath, and he detected that QUIGLEY was slightly unsteady on his feet. He did not observe any other signs of intoxication. When he first saw ROBERT QUIGLEY, Bevis did not suspect that ROBERT QUIGLEY'S faculties were impaired. (T-338, 339, 406).

ROBERT QUIGLEY was never asked to perform the routine physical tests normally conducted when a driver is suspected of being under the influence to the extent his normal faculties are impaired. ROBERT QUIGLEY was never video taped as is normally done. (T-403-407).

The overwhelming evidence establishes that ROBERT QUIGLEY'S normal faculties were not impaired.

ROBERT QUIGLEY's blood alcohol level should not have been presented to the Jury for the reasons set forth in Point I.

The evidence does not sustain a finding that ROBERT QUIGLEY was under the influence of alcoholic beverages to the extent his normal faculties were impaired, or that he had a blood alcohol level of .10% or higher. The Record simply fails to show beyond a reasonable doubt that ROBERT QUIGLEY was guilty of this essential element of the crimes. Consequently, ROBERT QUIGLEY was improperly convicted of the two (2) DUI Counts. *W.E.B. III v. State,* 553 So.2d 323 (Fla. 1st 1989); *Henry v. State,* 574 So.2d 73 (Fla. 1991).

POINT III:

THE VERDICT IS CONTRARY TO THE LAW IN THAT THERE IS NO EVIDENCE TO PROVE THE CORPUS DELICTI OTHER THAN THE DEFENDANT'S ADMISSION THAT HE HAD BEEN DRIVING THE VEHICLE INVOLVED IN THE ACCIDENT.

The only two persons who saw the accident were Anita F. Hawley, a victim, and Terry Schulze. Mrs. Hawley testified that she could not tell who or how many persons were in the pickup truck. (T-146). Terry Schulze did not make any statement about seeing the driver, or persons in the truck.

When the Hawleys were struck, they were walking in the roadway of an unlighted two-lane county road at night. Mr. Hawley was approximately four and a half (4½) feet in the road; Mrs. Hawley was holding his hand, walking to his right. They were walking with the traffic, contrary to the law, and contrary to Mrs. Hawley's fears and the admonitions to her husband that it

was dangerous walking in the roadway on the wrong side of the road at night. Although there was an accident, there was no evidence of improper operation of the truck. Evidence established that speed was not a factor in the accident.

The last time ROBERT QUIGLEY was seen driving the truck was prior to midday. (T-60, 65). The first mention of ROBERT QUIGLEY being at the scene of the accident is the testimony of Ursula Smith. At that time, she saw him running to the scene of the accident from the direction of his townhouse. (T-280).

In *State v. Allen,* 335 So.2d 823 (Fla. 1976), the Florida Supreme Court wrote:

> "It is a fundamental principal of law that no person be adjudged guilty of a crime until the state has shown that a crime has been committed. The state therefore must show that a harm has been suffered of the type contemplated by the charges . . . and that such harm was incurred due to the criminal agency of another . . . A person's confession to a crime is not sufficient evidence of a criminal act where no independent direct or circumstantial evidence exists to substantiate the occurrence of a crime. . . . The state has a burden to bring forth 'substantial evidence' tending to show the commission of the charged crime. This standard does not require the proof to be uncontradicted or overwhelming, but it must at least show the existence of each element of the crime. . . ."

Without the statement of ROBERT QUIGLEY that he was driving the truck, there is no substantial evidence tending to show that the crime charged was ever committed. Moreover, there is no evidence other than ROBERT QUIGLEY'S statement which placed him

behind the wheel of the vehicle at the time that he allegedly committed the offense. Consequently, this case falls within the language of *Farley v. City of Tallahassee*, 243 So.2d 161 (Fla. 1st 1971), wherein this District Court wrote:

> "In other words, without the admission by defendand that she was driving, there is no proof of the corpus delicti. Although it is the minority rule throughout the country [citation omitted], it is the law of this state that the corpus delicti must be prima facie established independently of the admission or confession of the defendant and that the admission may not be considered as part of the evidence going to make up the proof of the corpus delicti. It is true that once it is shown that a crime was committed, defendant's connection therewith may be shown by an admission, but as pointed out above, defendant's admission was an essential link in the proof that an offense was committed.
>
> The principle under discussion is so fundamental in our law that when such error is committed, a reversal of the conviction is required." *Farley v. City of Tallahassee*, 243 So.2d 161 (Fla. 1st 1971).

This Court also particularly quoted:

> ". . . regardless of the number of intoxicated persons at the scene of an accident, even if they are car owners, there is no violation of the ordinance unless and until it is shown that an intoxicated person was driving or was in physical control of a vehicle."

The Fifth District Court in *State v. Hepburn*, 460 So.2d 422 (Fal. 5th 1984), cited *Farley* and found that statements made by a driver were properly suppressed when there was no evidence which placed appellee behind the wheel of the automobile which struck pedestrians. The Court wrote:

> "A, if not the, critical element of the corpus delicti of the offense of driving while intoxicated is evidence that the defendant was driving at the time she allegedly committed the offense . . ."

This Appellate Court wrote in *W.E.B. III v. State,* supra:

> ". . . it does not follow, however, that every fatality, regrettable as it may be, is accompanied by and results from conduct warranting a criminal conviction. . . . Before one can be so condemned it must be established beyond and to the exclusion of every reasonable doubt that the defendant has been guilty of negligence of the character heretofore defined.
>
> [Footnotes omitted.] *Jackson v. State,* 100 So.2d 839, 840 (Fla. 1st DCA 1958). Moreover, in *Jackson* we recognized the well-established principle in this jurisdiction 'that criminal liability does not attach when the accused is by circumstances and conditions beyond his control and against his will, placed in the position and subject to the conditions which resulted in the death with which he is charged.' *Id.* at 841."

In the instant case, as in *Farley* and *Hepburn,* other than ROBERT QUIGLEY'S statement, there is nothing to connect ROBERT QUIGLEY to the offense charged, nor is there proof that the offense charged was ever committed by anyone. Consequently, a "reversal of the conviction is required".

## POINT IV

## THE COURT ERRED IN FAILING TO DIRECT A MISTRIAL IN VIEW OF THE ARRESTING OFFICER'S STATEMENT ON CROSS-EXAMINATION THAT "I WAS NOT ABLE TO GET A STATEMENT FROM MR. QUIGLEY".

On Cross-Examination, Trooper Steven R. Bevis was being questioned regarding his determination of the distance which it took ROBERT QUIGLEY to stop the truck after the impact. Trooper Bevis had previously testified that one of the basis for his opinion that ROBERT QUIGLEY was impaired, was the fact that ROBERT QUIGLEY did not appear to take evasive action prior to the impact, and that the truck traveled an excessive distance from point of impact to where it was properly and lawfully parked. Officer Bevis' investigation had indicated the truck had traveled one hundred seventy (170) feet. Terry Schulze and Anita F. Hawley had previously testified that the truck had stopped after impact and then had been moved to where it was parked.

Cross-Examination of Trooper Bevis was as follows:

(By Mr. Fiorentino)

"Q. Now, you also say that you based your decision that Mr. Quigley was impaired on the distance it took to stop the truck and park, stop the truck, assuming that it stopped where it was parked from the point of impact up here to where you have marked on the exhibit, on this exhibit, I think you have said this was 170 feet?

A. Yes, sir.

Q. And you made your determination that he didn't attempt to stop, it took him this period of time to

stop and, therefore, it's an excessive distance to stop, didn't you?

A. Yes, sir.

Q. Now, do you know – did you know then whether Mr. Quigley had attempted to stop the truck or did stop the truck prior to where Mr. Hawley came to rest?

A. No, sir.

Q. Did you attempt to make any determination in that regard?

A. I was not able to get a statement from Mr. Quigley. (T-367, 368).

. . .

THE COURT: Mr. Fiorentino, you were saying.

MR. FIORENTINO: Judge, I'm afraid we're going to have to ask for a mistrial. There was nothing here that was asked about him trying to get a statement from Mr. Quigley. I asked if he tried to make a determination whether Mr. Quigley had stopped the truck, and the officer comes out and says I have been unable to get a statement. I think this again is evidence to the jury regarding his right to remain silent." (T-368).

The Trial Court found that Trooper Bevis' statement was fairly susceptible of being interpreted by the Jury as a comment on Defendant's right to remain silent and that the statement was not invited by the Cross-Examination, stating as follows:

"THE COURT: The Court finds it was not invited, that the questions as I have read are not capable of interpretation which would be that they somehow invited the response that this officer gave, I was not able to get a statement from Mr. Quigley. The ques-

tion was did you attempt to make any determination in that regard, that is, whether Quigley had attempted to stop the truck or did stop the truck. Any number of responses could be given other than a comment on the defendant's right to remain silent. The response that was given, 'I was not able to get a statement from Mr. Quigley,' must be viewed in light of the test which has been enumerated in *State vs. Kinchen*, reported at 490 So.2d 21 and *State v. Thornton* reported at 491 So.2d 1143 by the Florida Supreme Court and reaffirmed time and again. The test is whether that comment, the response of this officer, is fairly susceptible of being interpreted by a jury as a comment on the defendant's failure to testify or right to remain silent. And in the context that it was given, I must find that it is fairly susceptible of being interpreted by the jury as a comment on the defendant's right to remain silent.

I sustain the objection. I will take under advisement the request for a mistrial, and I will consider the State or the defendant's request for a curative instruction, and if so, what you may suggest that a curative instruction would be. The State has requested it. Does the defense request it?" (T-376-377).

The defense objected to a curative instruction. (T-378).

Thereafter, the Trial Court advised the Jury as follows:

"Immediately before the recess during the examination of this particular witness, the witness made a comment in the – 'and the last comment the witness made I specifically ask you to disregard it, do no consider that comment in any way in your deliberations, strike it from your consideration completely. Thank you." (T-379-380).

Since the Trial Court found that Officer Bevis' statement is fairly susceptible of interpretation by the Jury as a comment on the Defendant's right to remain silent, the Court "must apply the harmless error analysis to the 'fairly susceptible' comment in order to obtain the requisite discriminatory capacity". *State v. Diguilio,* 491 So.2d 1129 (Fla. 1986); *State v. Hamilton,* 574 So.2d 124 (Fla. 1991); and *Henry v. State,* 574 So.2d 73 (Fla. 1991). In *Diguilio,* the Florida Supreme Court wrote:

> "[7,8] The harmless error test as set forth in *Chapman* and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. *See Chapman,* 386 U.S. at 24, 87 S.Ct. at 828. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict."

The Court quoted from Chief Justice Traynor of the California Supreme Court:

> "Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result."

The Court continued:

"We wish to make it clear that the harmless error test is to be rigorously applied."

The Record in the instant case shows that the error is not harmless. In this regard, it should first be noted that the Jury convicted the Defendant of vehicular manslaughter. There was simply no evidence of any reckless operation of the motor vehicle. As a consequence, the Trial Court later granted a judgment of acquittal. (R-977). Second, the Defendant did not take the stand and he sought to suppress any statements made by him to the Investigating Officer, (R-945), and to various individuals throughout the trial. (T-89, 90; 277). Last, he did not request the Standard Jury Instruction concerning a Defendant not testifying.

The permissible evidence was not clearly conclusive. The victims clearly caused the accident by unlawfully and improperly walking in a dark roadway. They had been drinking to excess. They failed to use the walking path. They failed to take any evasive action.

There was an oncoming car driven by Terry Schutlz that prohibited use of the Westbound lane to go around the Hawleys and which diminished visibility. Although there were no skid marks, the evidence established the truck had antilock brakes, and consequently, would not skid or leave tire marks. The evidence further established that the truck stopped after impact; that it was subsequently moved and lawfully parked.

Mr. Bobby Smith, a Reconstruction Expert, testified in detail regarding the accident. His testimony, experiments and video tape of a reenactment of the accident established that under the circumstances, the accident was unavoidable; that ROBERT QUIGLEY's

reaction time was normal; that due to the antilocking braking system, the truck would not skid; and he estimated the vehicle's speed at thirty-three (33) to thirty-seven (37) miles per hour at the time it started braking. (T-603-620).

Mr. James Anderson, an expert retained by the State, testified that he experimented with the truck, and the truck would not skid.

Both experts, and Officer Bevis, testified that speed was not a factor in the accident. There was no evidence of improper operation of the truck.

The Record is replete with testimony from Police Officers; friends; neighbors; a relative; and the Medical Technologist that ROBERT QUIGLEY'S physical abilities were not impaired.

There is minimal and equivocal evidence that ROBERT QUIGLEY'S faculties were impaired.

There is a fatal discrepancy regarding the authenticity of the blood alcohol results.

The impermissible testimony of Investigator Bevis placed before the Jury the fact that ROBERT QUIGLEY declined to offer any plausible explanation both at the time of the accident and the time of his arrest. The testimony at least highlighted for the Jury that ROBERT QUIGLEY was still offering no plausible explanation at trial.

On this Record and under the tests set forth in *Diguilio,* it is clear the State cannot show beyond a reasonable doubt that the Police Officer's impermissible testimony was harmless and did not affect the Jury Verdict.

## CONCLUSION

The Record establishes that other than ROBERT QUIGLEY'S statement to the Investigating Officer that he was driving the vehicle, there was not a shred of evidence that an impaired person was driving the vehicle involved in the accident, or that a crime was committed. The State must establish the corpus delicti by substantial evidence independent of the admission or confession of ROBERT QUIGLEY before that admission or confession may be considered. The principal is so fundamental that when error is committed, a reversal of the conviction is required. *Farley v. City of Tallahassee,* supra. It does not follow that because a fatality has occurred, a crime has been committed. *W.E.B. III v. State,* supra.

The overwhelming evidence establishes that ROBERT QUIGLEY'S normal faculties were not impaired. In addition, the Court erred in admitting results of the blood alcohol level. There is no proof beyond a reasonable doubt of these essential elements. The conviction should be reversed.

In the event the Court does not reverse the conviction, it is submitted that this Court should order a new trial on the basis that the improper comment on the Defendant's right to remain silent was harmful error.

Respectfully submitted,

/s/ Antony E. Fiorentino
Antony E. Fiorentino

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Peter Williams, Assistant State Attorney, 190 Governmental Center, Pensacola, Florida 32501, by U.S. Mail, this 23th day of September, 1991.

/s/ Antony E. Fiorentino
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## APPENDIX N

[Filed Aug. 11, 1992]

IN THE CIRCUIT COURT IN AND FOR
ESCAMBIA COUNTY, FLORIDA

CASE NO. 90-5361-M

STATE OF FLORIDA,

Plaintiff,

v.

ROBERT ERLE QUIGLEY,

Defendant.

### ORDER STAYING EXECUTION OF SENTENCE, STAYING BAIL, AND CONTINUING PRESENT BOND

THIS COURT having received the mandate from the District Court of Appeal, First District of Florida, after the said Court affirmed the judgment and sentence previously entered herein, and the Court being advised that the Defendant will petition for a writ of certiorari to the United States Supreme Court, and this Court being otherwise being fully advised in the premises, it is

ORDERED AND DECREED that:

1. The execution of the sentence rendered herein is stayed until Defendant's petition for writ of certiorari is dismissed, denied, granted or otherwise finally adjudicated by the United States Supreme Court.

2. The bail previously set in this case shall remain the same, and the bond on which the Defendant is presently at liberty shall remain in full force and effect until such

time as the Defendant's petition for writ of certiorari is dismissed, denied, granted or otherwise finally adjudicated by the United States Supreme Court.

ORDERED this 10th day of August, 1992, in chambers at the Escambia County Judicial Center, Pensacola, Florida.

/s/ Michael Jones
Michael Jones
Circuit Judge

Copies to:

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## APPENDIX O

SUPREME COURT OF THE UNITED STATES

No.

A-240

Robert Erle Quigley,

Petitioner,

v.

Florida

### ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 30, 1992.

/s/ Anthony M. Kennedy

Associate Justice of the Supreme Court of the United States

Dated this 21st
day of September, 1992.

## APPENDIX P

## EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

### TESTIMONY OF ANITA HAWLEY

[130] Q. All right. Now, getting to the late afternoon time period, what did you two do then?

A. Okay. It was 5:00 and we discussed walking down to the condo where we had spent our first honeymoon to just reminisce and watch the sunset.

Q. And what did you do?

A. I went upstairs and changed into my bathing suit and beach robe, and he had on a shirt, shorts, and a white T-shirt, and he was already dressed, and he stayed downstairs and fixed us, I thought, each a couple of drinks and he was drinking Coke because he couldn't drink because of a previous heart ailment.

Q. Let me ask you, did you have anything to drink prior to this point during the day?

A. Two or three beers.

Q. Over how much time?

A. Oh, gosh, a long time.

Q. What kind of drink was mixed?

A. It was a bourbon and water.

Q. What was it put in?

A. A Big Gulp jug, Sun Surf or something like that.

Q. Now, did your husband drink at that time, drink alcohol?

A. No, sir.

Q. Had he had anything to drink all day that you [131] knew of?

A. No, sir.

Q. Tell the jury where – how you got to the beach?

A. We crossed the highway driectly in front of the townhouse and walked to the beach, and we went along the beach at that point, and we were both tired, and there was a log laying out in the water. So we sat down on that to rest a minute because we weren't used to walking in the sand, and we were already tired so anyway. We were watching the surf come in, and it started getting bigger and bigger and bigger, and one big wave came along and he jumped up and jumped back on the beach. And when I got away from it, it was too late, so I got wet.

And so then we walked on down to the condo, and we sat down there for maybe five or ten minutes, and a big black cloud started coming in. So we sat there and watched it and we looked at the sunset and going to watch the cloud and watched the sunset, and then all of a sudden here it was, and we decided we would hurry and get back before we got drenched, and it was turning cooler.

Q. Which way did you come back?

A. We went across the bridge onto the roadway.

Q. What's the bridge? What's it made out of?

A. Wood.

Q. Onto the roadway, which road is that?

[132] A. Fort Pickens Road.

Q. Would it help your testimony to the jury to use a photograph to point out where you went?

A. Possibly.

MR. WILLIAMS: May the witness step down, Your Honor?

THE COURT: Yes.

Q. (By Mr. Williams) Mrs. Hawley, we'll need you to step pretty close to the jury, because this photograph isn't very large. Why don't you take a look at it first and make sure you recognize everything in it. When you can answer that, let me know.

A. Okay. I believe –

Q. Can you recognize what it depicts?

A. Well, right, okay.

Q. Let's step over here so the jury can see.

A. I am not sure which townhouses is which

Q. Let me start there then. Do you recognize the complex you moved into that day in that photograph?

A. Yes, sir.

Q. Point out for the jury where that was.

A. In this area.

Q. Which building did you live in?

A. In the center. It must have been right here.

Q. Now –

[133] THE COURT: Mrs. Hawley –

THE WITNESS: Or maybe not. Yes, sir.

THE COURT: When you answer the questions, could you speak up a little bit?

THE WITNESS: Okay.

THE COURT: Thank you.

Q. (By Mr. Williams) Show the jury.

A. I don't remember which apartment was ours. I might be mixed up on that.

Q. If you could, show where you walked now to get to the beach.

A. It had to be this one over in here, because it wasn't that far across to the beach.

Q. So where did you come out to go to the beach?

A. From the driveway, directly across.

Q. Now, when you crossed that driveway, did you notice a bike path there?

A. No, I did not.

Q. And why do you think you didn't notice it?

MR. FIORENTINO: Objection, why she didn't notice, Your Honor. She answered she did not.

THE COURT: Overruled – excuse me, I am going to retract that and sustain the objection. Go on to your next question.

Q. (By Mr. Williams) Did you have any knowledge [134] there was a bike path there?

A. No, sir.

Q. Indicate where you crossed over the beach and which direction you walked, if you could.

A. Okay. We crossed over here and we walked to the beach here in this area.

Q. All right. And which way did you walk?

A. Toward the condo up here.

Q. All right. And are you able to tell if the bridge you used to cross the back to the road is depicted in that photograph?

A. Yes, sir, here.

Q. And show the jury where it is you got out on Fort Pickens Road then.

A. Right here.

Q. And which direction did you walk in then?

A. This way.

Q. All right. Thank you. If you could take the stand again, please. Now, when you got to Fort Pickens Road, what was the lighting like?

A. It was beginning to get darker and darker.

Q. Do you remember if cars had their headlights on or not?

A. Yes, sir.

Q. You started walking eastbound, you indicated?

[135] A. Yes, sir.

Q. What side of the road did you walk on?

A. On the wrong side.

Q. What do you mean by that?

A. We were walking with the line of traffic and not against it.

Q. So that would be the beach side of the road or the other side?

A. The beach side.

Q. And traffic was coming, and your lane was coming at you or from your back?

A. From the back.

Q. Now, were you walking single file or side by side?

A. Side by side.

Q. Do you recall if you were holding hands?

A. We were holding hands.

Q. How much of the time in the road did you say you were holding hands?

A. At one point he tried to put his arm around me and walk, but with his limp, you couldn't walk like that.

Q. Now what were each of you wearing?

A. He had on a pair of blue shorts and white T-shirt, and I had on a bathing suit and a white beach robe.

Q. What about any footwear?

[136] A. No, we were barefooted.

Q. So as you walk down the road, where were you walking?

A. I was walking on the sand.

Q. Now, do you recall the edge of that road?

A. Yes, sir.

Q. Is there a line on the edge?

A. Right on the edge, yes, sir.

Q. Is there any room from that line to walk on the road?

A. No, sir.

Q. On the outside of the road?

A. No, sir.

Q. Do you recall yourself what kind of surface you walked on?

A. I walked on the soft surface.

Q. What was it?

A. It was sand.

Q. Now, did you encounter any difficulty walking?

A. Yes, sir, I stepped on a sandspur and it hurt my heel.

Q. And how about your husband – what was his name?

A. Harry.

Q. Where was he walking?

A. He was walking on the concrete.

[137] Q. So you know where that white line is. Was he on the inside of the that white line or on the outside?

A. I am not sure.

Q. Do you recall on the concrete?

A. He was on the concrete, yes, sir.

Q. All right. Now, why were you walking back to traffic?

A. Because it was getting darker and darker. We were in a hurry. We were hungry. We were going back so I could cook dinner. We hadn't eaten yet.

Q. Why did you take the road to begin with instead of the beach?

A. Because the sand was hard to walk in and we couldn't walk as fast.

Q. Did you express any concern to your husband about what part of the road you were walking on?

A. Yes, I asked him if he didn't think we should try to cross the road and face the traffic.

Q. So were you aware that you were walking on the wrong side?

A. Yes, sir.

Q. How did that make you feel?

A. Nervous, very cautious and I was constantly looking back.

Q. What were you looking for?

[158] A. Cars.

Q. Do you recall any cars passing you?

A. Yes, sir.

Q. How many would you say?

A. I would say at least four.

Q. Do you remember, any of them flick their lights at you?

A. No, sir.

Q. You don't remember a car flicking its lights at all?

A. No, sir.

Q. Did any of the cars passing you force you to get off of the road?

A. Well, they didn't force us off the road, but I could see them, you know, because I was watching and they were getting close and he wasn't paying any attention so –

Q. Who is he?

A. Harry, my husband. So I stepped back and pulled him off the road and, yes, I knew we were in danger.

Q. Did you pull him off every time a car came along or just sometime?

A. I pulled him off when the three came by.

Q. When the what?

A. When the three cars back to back came by, and that's when he – you know, we were standing there they [139] saw me pull him back.

Q. Now, why did you not take the bike path?

A. Because he assured me, "Sweetheart, we're in no danger, relax."

Q. Did you testify earlier – did the subject even come up that there was a bike path?

A. No, sir.

Q. Do you recall if you saw anyone over there on the bike path?

A. Not, not to recognize him as an individual, no.

Q. Could you see anything looking over across the road on the other side as to whether there was a path or not?

A. Not really.

Q. Why is that?

A. Because of sand dunes.

Q. All right, Now, as you proceeded down the road, did you ever mention whether or not you should cross over?

A. We discussed it, yes.

Q. And did you cross over?

A. No, sir.

Q. Why not?

A. Because we were so close to the townhouse that I just thought, well, we made it so far, we're almost there, we were across – right in front of it, where we knew where the driveway was.

[140] Q. All right, Now, right about that point do you recall whether or not you looked back for any cars?

A. I was just looking back, every few minutes, I mean, just – because I was paranoid because of previous accident or almost accident rear end in Memphis.

Q. Now, describe for the jury what happened about that point.

A. Well, at that point I had just looked back, and I didn't see any headlights anywhere. It was just total dark, and –

Q. It's all right, Mrs. Hawley. If you need a minute, let us know.

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[141] Q. (By Mr. Williams) Mrs. Hawley, before we broke for lunch, I had asked you what event happened next at this point in your testimony about the events of that evening.

A. Right. My thoughts would be, okay, we're almost home now. I had just looked over.

Q. Could you explain that? What do you mean by that?

A. Well, rather than crossing the road at that point –

Q. Yes, ma'am.

[142] A. –I said to myself, we'll be okay, we're almost home now, and then just moments after that, we were struck by a pickup truck.

Q. Tell me what you felt.

A. Well, the first thing I felt and really the only thing I felt was just a devastating blow to this area of my shoulder.

Q. You're indicating your upper left shoulder on the backside?

A. Right. And across the back of my neck, and it was just devastating pain.

Q. Now, do you recall seeing any lights coming up behind you?

A. No, sir.

Q. How about any sound of brakes?

A. No, sir.

Q. Did you ever hear any sound of brakes?

A. No, sir.

Q. Or tires?

A. No.

Q. Or any kind of unusual sound behind you?

A. No.

Q. What happened to you?

A. I was thrown to the right-hand side of the road.

Q. Now, do you recall, you were holding hands with [143] your husband at that time?

A. Yes, we were still holding hands.

Q. What did you feel, if anything, through his hand?

A. I didn't really feel anything because the pain in my shoulder was so great, I was just – I was stunned.

Q. All right. Were you hurt anywhere else besides your shoulder?

A. Yes, sir.

Q. Tell the jury please where else.

A. I sustained severe bruises all the way across the shoulder area of my back as well as a sprained ankle, bruised hip, upper left hip, and I was so sore, I just couldn't move.

Q. Now, how about your arm, any injuries there?

A. Yes, the left forearm was severely bruised, also.

Q. And you say the back was bruised. Anything visible on your back, any cuts?

A. No, sir.

Q. Now, do you know if you held consciousness or not?

A. I am not real sure, because the drink that I was carrying I feel like all went into my face.

Q. That was –

[144] A. That was the drink I was supposed to have been drinking.

Q. Would you call a thermos?

A. I call it a Big Gulp, a big cup.

Q. What hand were you holding that in?

A. It was in my right.

Q. And which hand was holding your husband's hand?

A. The left.

Q. Where were you when you got hit? Where were your feet?

A. I was on the sand.

Q. And where was your husband as best you can recall?

A. He was holding my hand right next to me.

Q. On the roadside?

A. Still with our backs to the traffic.

Q. Was he on the road or not?

A. I'm sure he was still on the road.

Q. What happened to that drink when this happened?

A. Well, whenver the impact, I saw the jugs, he had one also, and they bounced off the concrete. And after that, you know, I don't know.

Q. Did your drink splash on you at all?

A. I am not too real sure, but I feel sure it did because I was too cold.

[145] Q. Tell us after you were knocked down to the ground, what you did when you got up.

A. I jumped up running and just as I jumped up, I said oh, my God, we've been hit, and then I felt panic.

Q. Where did you run to?

fic.

Q. Where did you run to?

A. Across the road.

Q. Were any cars coming –

A. No, sir.

Q. – on the other side of the road at you?

A. I didn't see any headlights at that point. Everything was still totally dark.

Q. After you crossed the road, what did you do?

A. I started running up the road toward oncoming traffic looking for my husband and yelling, "Where are you?"

Q. Now, do you recall seeing anything about the car or vehicle that hit you?

A. Yes, sir, the pickup at that point – at the same time I saw my husband's body on the roadway, he had pulled in the lane of oncoming traffic, and I saw the taillights of the truck.

Q. Okay. And what did the truck do then?

A. It pulled back over on the right, because there was a car meeting – oncoming there, and he pulled off to the right of the roadside.

Q So then did he go beyond the body?

[146] A. Yes, sir.

Q. The pickup?

A. Yes, sir.

Q. Could you tell who was in the pickup?

A. No, sir, I could not at that point.

Q. Could you tell anything about how many people were in it?

A. Not really. I thought there was only one, but like I said, you know, it was quite a ways on up.

Q. Now, did you ever see anyone from that truck come back towards you –

A. No, sir.

Q. – and where your husband was lying?

A. No, sir.

Q. Who was the first person you remember seeing other than your husband lying there?

A. It was a female standing at the door of the truck talking to the driver.

Q. Okay. Who is the first person you talked to?

A. The first person that I recognized coming up to the scene was a police officer.

Q. Okay. Do you remember a lady, blonde lady who was driving a red Corvette?

A. Yes.

Q. When did you first see her?

[147] A. She pulled on up directly across from my husband's body and offered me a seat in her car, and I was real concerned about getting her car wet, because I was wet or I felt like I was wet anyway, and she assured

me it was okay, not to worry about it, but I knew it was an expensive sports car, so I wanted a cigarette so bad because I was in shock.

Q. Do you remember talking to her about what had happened?

A. No, I don't remember.

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TESTIMONY OF MARIANNE IRVIN

[119] Q. Just tell us, does it depict Fort Pickens Road?

A. Yes.

Q. Okay. What area of Fort Pickens Road does it show to you – does it depict?

A. It shows me the area where the accident happened, where the people were walking.

Q. All right. There were some dunes in there?

[120] A. Yes.

Q. Would you tell the ladies and gentlemen of the jury, was the accident, or where you saw them walking, excuse me, in the area of the dunes?

A. Tell them where I saw them?

Q. Where is the area where you saw – when you saw the people walking on the road, was it in the area of these dunes?

A. Yes.

Q. Where the fence is?

A. Yes.

Q. All right. Now, when we say the white line, they were walking then in the roadway?

A. Yes, sir.

Q. Your lane of traffic?

A. Yes.

Q. And I believe that there was a – one person was large and one person was small?

A. There was two people.

Q. Do you remember a larger person and a smaller person, I mean, proportionwise?

A. Yeah.

Q. Where – was the larger person about in the center of your traffic lane when you saw him?

MR. WILLIAMS: Your Honor, Mr. Fiorentino is [121] testifying for the witness.

THE COURT: Overruled. You may answer the question.

THE WITNESS: Okay. There were – when they were walking, there was a smaller – it looked like it could have been a lady and then a man, and the lady next to the white line, the other person, the smaller person to the white line and the other person further in the road.

Q. (By Mr. Fiorentino) Was he about in the center of your lane of traffic when you saw him?

A. Yes.

Q. Did you have to take – I mean, was this a fairly close situation as far as your seeing and recognizing them and pulling around them. I don't mean swerving to the left, but did you have to react quickly to get around them?

A. Yes, I didn't swerve, but, yes, it was.

Q. Did you expect to see anybody walking down the road like that?

A. No.

Q. How long have you lived out there on the beach and driven that road?

A. A year.

Q. Are you familiar with what the lighting condition is particularly in this area where these dunes are?

[122] A. Yes.

Q. Tell the ladies the gentlemen of the jury a little bit about that.

A. There is absolutely no lighting there. Once the sun goes down and it gets dark, it's dark.

Q. Now, are there dark areas and light areas, as far as how the beach is where the dunes are and other places, you took and discussed that?

A. Yes.

Q. Explain this to the ladies and gentlemen of the jury what you told about the dark and light areas.

A. On the populated areas out there where they have the streetlights and this is an unpopulated area, there is no provivions for any type of lighting and from – from one set of condos down to the next set of condos, there is just no lighting.

Q. And it's dark?

A. Yes.

Q. All right. Now, is it hard to see somebody walking on that road?

A. Yes.

Q. At night I'm talking about.

A. Yes.

Q. What about if there is oncoming traffic, have you experienced what it's like trying to drive that road?

[123] MR. WILLIAMS: Objection, calls for speculation.

MR. FIORENTINO: She says she's familiar with the road. She's familiar with the conditions, and I would like to have – I think she's qualified to answer what this does.

THE COURT: To the extent of the question was asked, I am going to overrule the objection and let the witness respond. Again, I will ask you to repeat the

question so the witness clearly understands. And, ma'am, respond only to the question asked, please.

Q. (By Mr. Fiorentino) Are you familiar with your ability to see on that road at night with traffic coming at you?

MR. WILLIAMS: Objection, vague question.

THE COURT: Overruled.

Q. (By Mr. Williams) Are you familiar with the situation where you're driving down there and there is oncoming traffic?

A. Yes.

Q. Does this affect your ability to see –

A. Yes.

Q. – what's in front of you?

A. Yes, it does.

Q. The oncoming traffic?

A. Yes, it does.

[124] Q. Tell the ladies and gentlemen of the jury what you have experienced in this regard. Just describe what it's like.

A. Well, when you have oncoming traffic at you in a dark area like that, it hinders your distance of visibility in front of you, because if you look at the lights, it totally blinds you, and if you look down away from it, then you are not getting a full vision out in front of you.

Q. And this is what you have noticed driving this two-land road there – particularly driving this two-lane road there?

A. Yes, sir.

Q. When you saw these people walking and you flashed your lights and you saw they were in the road, what was your thinking about the situation of them walking down this road?

A. Why were they in the road and not using the bicy-

cle path and the walking path that's just across the street. It's there for that purpose.

Q. Were you concerned that this was an accident waiting to happen?

MR. WILLIAMS: Objection, relevance.

THE COURT: Overruled. You may answer answer the question.

THE WITNESS: Yes, I was.

[125] Q. (By Mr. Fiorentino) The fact that these people ignored – you say did not pay attention to your flashing the lights and did not move, what was your reaction to the fact they were not moving when you were flashing the lights?

A. They were dumb, kind of made me a little upset that they weren't observing the laws and on the wrong side of the road anyway.

Q. But was there anything between you and the individuals where they could not see your lights flashing up and down?

A. No.

Q. Was there any car between you and them?

A. No.

Q. Was there any type of a curve or a turn?

A. No.

Q. Was there any type of little hill that that would crest over that you would be coming up and the lights wouldn't shine on them?

A. No.

Q. Or they wouldn't see your lights going up and down?

A. No.

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## TESTIMONY OF URSULA SMITH

[280] Q. Mrs. Smith, the first time you saw Bobby Quigley, he was running back across the street from his – from the direction of his townhouse, correct?

A. I saw him crossing the street, yes.

Q. And you saw him running back to the scene?

A. Yes.

Q. And you were there at that time?

A. Yeah.

Q. And you two live, I think, I know, two doors apart?

A. Yeah.

Q. When he first came running back to the scene, you really didn't realize who he was, did you?

A. No.

Q. Tell the ladies and gentlemen what –

A. I looked at him and he looked really familiar, and I asked him, I said, You look so familiar. Where do I know you from?" And he didn't say anything so –

Q. And then?

A. And then I asked him at that time, "What happened? Who did this?" And he told me that he did, and I [281] told him that I saw the couple walking down earlier on the street, and he asked me to stay there and tell the police.

Q. And that was the point you recognized who he was, isn't that?

A. Yeah.

Q. You two are just not friends?

A. No.

Q. You live next door to each other, but you are not friend friends?

A. No.

Q. Now, and you stayed there at his request, didn't you?

A. I stayed, gosh, for about 20 or 30 minutes, and then I ran across the street.

Q. When you started to run across the street – tell the ladies and gentlemen why you ran across the street.

A. I went to get my husband to come over and stay with me. I was upset and I was nervous.

Q. When you started going away, what did Mr. Bob Quigley say to you?

A. He asked me to stay.

Q. He said, "Please don't leave, stay," he wanted you to tell the police officers what you had seen?

A. Yes.

Q. Now, when you saw the man and woman going – [282] walking down the road, tell the ladies and gentlemen of the jury here what your thinking was and what you did as you passed them.

A. I was upset because they were walking too close to the road and on the road and off, and I actually – as I drove my car, I actually spoke to myself in the car and made a statement, you know, there is a sidewalk across the street.

Q. There is a sidewalk across – you mean a walking path?

A. Yeah, there is a walking path right across the street, and it was really dangerous. It upset me. I actually spoke out and said that out loud in my car.

Q. The danger of the situation is what upset you?

A. Yes.

Q. Prior to your getting – you're going west toward the Tom Thumb from your house?

A. Yes.

Q. And you live – well, actually the lady – the Haw-

leys lived in the same complex, but not next door to you, you learned that, did you not?

A. They lived in the next building over.

Q. So you had left your home and you turned right when you came out of your driveway and went down to the Tom Thumb?

A. Yes.

[283] Q. You got stuck down at Tom Thumb for quite a while, didn't you?

A. About five minutes, five, ten, minutes.

Q. Wasn't there a problem with somebody buying a thousand dollars of lottery tickets in front of you?

A. Yeah, but there was one clerk doing the tickets and one doing the purchases.

Q. So it was longer than you thought?

A. No, I would say a little more than five minutes, maybe.

Q. Now, prior to your passing Mr. and Mrs. Hawley walking on the road, now, they are coming the other way and you're going west, did you see some people on the bike path?

A. Yes, I did.

Q. Tell the ladies and gentlemen of the jury the people that you saw on the bike path. Describe them to them.

A. I saw an older gentleman with a teenage girl, looked like a father and daughter, and they were walking.

Q. And they were walking west also or they were walking east or what?

A. East.

Q. All right. Would they have had to pass where Mr. and Mrs. Hawley were walking as –

A. I believe the Hawleys should have seen them walking.

[284] Q. The Hawleys should have seen them walking on the path?

A. Right.

Q. Now, when you saw Bobby Quigley running back across the street toward the scene, there was nothing unusual about the way he was running as far as his having any trouble running, was there?

A. No.

Q. When you were there with him at the truck, he appeared to be normal as far as having his faculties about him, is that correct?

A. Yes, he just stood behind the truck.

Q. There is nothing to suggest to you that he was impaired or physically impaired, was there?

A. No.

Q. Now, as I understand it, when you saw the Hawleys, she was walking on the road and Mr. Hawley was to her right, so he was walking in the sand and she was on the road at that point?

A. That's right.

Q. And how do you remember that? Tell the ladies and gentlemen of the jury about how you remember that.

A. Well, first of all, they were walking with their back to the traffic, and I – you know, male should always walk on the street side and the female on the other side. [285] That's my opinion, but they did walk with their back to the traffic.

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## TESTIMONY OF TERRY YVONNE SCHULZE

[312] Q. At the scene you apparently were very helpful to the victim's wife, do you remember her?

A. Yes, I do.

Q. What did you do with her?

A. When I got out of my car, I went over to her. She was at the body, and I got her away from the body.

Q. What did you do with her?

A. I started talking to her.

Q. What condition was she in?

A. She seemed to be very shaky.

Q. Now, did – at any point did she make any [313] statements to you about what had happened?

A. The first thing I asked her was what happened, what happened, what happened, and she was shaking and holding my hands, and she said we were crossing, and then someone else said something to me behind me, and I don't know if she said what she was crossing.

Q. Do you recall whether she smelled of alcohol or not?

A. Yes, I do.

Q. What did you smell? Can you describe it for us?

A. I smelled alcohol very strongly.

* * *

[314] Q. Now, excuse me, as I understand it, when you pulled up and parked on the side of the road, you were just west of where the husband was lying, this is Mr. Hawley it turns out?

A. Yes.

Q. Did you see the Hawley lady here today?

A. Yes, I did.

[315] Q. And this is the same lady you saw out there in the street that evening?

A. Yes, sir.

Q. Now, did you – you got out of your car – your car and saw her going to or at her husband's side, as I understand it?

A. Correct.

Q. And do you remember or seem to remember a vehicle being stopped just to the west, about 50 feet west where Mr. Hawley was lying?

A. Yes.

Q. And then you heard – you heard the engine of that vehicle running, and then it pulled around and parked?

A. Yes, sir.

Q. But you don't – your concentration was on, as I understand it, the individual on the road and the lady at that individual's side?

A. Yes, sir.

Q. This is something you kind of remember in the periphery of your vision and your mind, as I understand it, about where – there was a vehicle there, it was stopped and the motor was running and then had pulled around and parked, is that a fair description?

A. Yes, sir.

Q. Now, and then you looked over, you remember [316] seeing the vehicle parked, and you looked back over there sometime later and you saw the truck in the place that you remember the vehicle pulling over to?

A. Yes, sir.

Q. So is it your opinion that the truck that was parked was the vehicle that was stopped and then pulled around?

A. In my opinion, I would think so.

Q. Do you remember any other cars going by from the time you saw the flash in the air until you pulled up

going by in the opposite lane?

A. Could you repeat that question, please?

Q. There were no cars that came by from the time you saw the flash approximately 150 feet from – in front of you, no other vehicle came by you in that eastbound lane, did it?

A. Not that I recall.

Q. Until you pulled over?

A. No, sir.

Q. Now, describe the condition of Mrs. Hawley as – whether or not she was intoxicated or drunk in your opinion.

A. Well, my first thought as I spoke with her was that she was intoxicated for two different reasons. For one, that I smelled alcohol very strongly, and two were her actions.

[317] Q. Now, you knew she was upset, obviously upset about what she was seeing?

A. Yes.

Q. Did you have a feeling, notwithstanding her emotional state about seeing what she had seen or going through what she had gone through, could you separate this out in regard to whether or not you felt she was intoxicated?

A. I felt my judgment was that she was intoxicated.

Q. Intoxicated in your opinion, do you equate this with being drunk or a degree of drunkenness?

A. There are degrees of being drunk, most certainly. I feel like that she was above slightly. I mean, she was intoxicated, but she could walk, but her speech and her mobility and what have you appeared to be more than just being shaky and nervous.

Q. Did you have an opinion as to whether she needed to be down there walking down that road from what you

saw of her as far as her condition of alcohol?

A. In my opinion she shouldn't have been out there.

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## TESTIMONY OF FLORIDA HIGHWAY PATROL TROOPER WILLIAM C. SMITH

[217] Q. Mr. Steele, from the contact that you had with Mr. Quigley, you say you received his driver's license?

[218] A. Yes, sir.

Q. And you had some conversation with him then?

A. Briefly, yes, sir.

Q. And based on your conversation with him, your request for a driver's license and your observation of Mr. Quigley at that time, although it was brief, did you have form any opinion as to whether Mr. Quigley was under the influence of alcohol?

A. No, sir, I did not form an opinion.

Q. Based on your contact with him, did you form any opinion as to whether his faculties were in any way impaired, his ability to walk, talk, drive a vehicle, function as a normal human being?

A. No, sir. My contact was not to form any opinion in those matters.

Q. There was nothing in your contact with him that would suggest to you that he was in any way under the influence, was there?

A. No, sir.

Q. There was nothing in your contact with him to suggest to you that his faculties were in any way impaired?

A. No, sir.

* * *

[229] Q. So you had an opportunity to observe Mr. Quigley, how he was walking, standing, when he was talking to Officer Bevis and when he talked to you?

A. Well, we walked together, but I didn't actually watch him walk. It was dark and I had a flashlight, and I wanted to make sure he didn't stumble and fall.

Q. But you had an opportunity to see him?

[230] A. Yes, sir, I saw him.

Q. And then you had conversations with him, I believe?

A. Yes, sir.

Q. And he was in your car with you, to the hospital?

A. Correct.

Q. You had conversations with him then?

A. Yes, sir.

Q. His speech appeared normal to you, didn't it?

A. Well, he was kind of upset. I couldn't – you know.

Q. You had no reason to believe, though, from his speech that he was under the influence of alcohol, did you?

A. Not at that time, no.

Q. You never formed an opinion that he was under the influence of alcolhol, did you?

A. The only opinion that I came to at that time was that he had a very strong odor on his breath and that he probably would be over the legal limit.

Q. And this was after you had been at the hospital with him and you were driving back to the scene of the accident?

A. This was going to the hospital and coming back, the entire process that I was with him on a close-up basis.

[231] Q. You formed your opinion, though, you thought – and actually you just had a hunch that he was going to run over the legal limit, didn't you?

A. I had a feeling that the longer I was with him, the stronger the odor was and from past experience –

Q. You had a hunch?

A. I had a hunch that he would probably go over.

Q. Okay. Now, you had nothing that you saw that evening, though, that led you to form an opinion that his faculties were impaired as far as his ability to walk, talk, stand and perform as he normally would?

A. No, sir.

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TESTIMONY OF JEAN BELL, GULF BREEZE HOSPITAL MEDICAL TECHNOLOGIST

[266] Q. How many vials of blood did you draw?

A. Three.

Q. What do you normally draw?

A. It all depends on what testing you're doing, but the usual procedure on the legal alcohol testing is to draw the three tubes which are in the kit.

Q. And what did you do with the tubes once you had the blood drawn?

A. I gave them immediately to the trooper who was standing right there, and I watched him label the tubes, put [267] the chain of custody seals on them, put them in the box, seal it, and I signed for them.

Q. Okay. Did you place any marks yourself on those tubes?

A. No.

Q. Okay. Do you recall if the vacuum tubes had any white powder in them?

A. I believe the purple top tube had some powder in them which is an anticoagulant.

Q. Okay. And there are other colors involved?

A. I believe they were yellow tops.

MR. FIORENTINO: I didn't hear her answer.

THE WITNESS: Yellow topped, two yellow topped

tubes and one purple top.

MR. WILLIAMS: Okay. Thank you, ma'am.

CROSS EXAMINATION

BY MR. FIORENTINO:

Q. Ms. Bell – Ms. Bell, my mouth is getting dry, you had an opportunity to talk with Mr. Quigley that evening?

A. Yes, somewhat.

Q. You told him what you were going to do, is that correct?

A. Yes.

Q. You had an opportunity to see him and walk and talk?

A. Yes, I did.

[268] Q. He was wandering around and you had him in the lab, I believe?

A. That's right.

Q. Did you see anything out of the ordinary about his walking, his ability to walk?

A. No, sir.

Q. Did you see anything out of the ordinary about his ability to talk?

A. No, sir.

Q. He looked at some items in your lab, I think, and he even inquired why you had a shower in there?

A. That's right. There is a shower in the middle of the lab.

Q. And he had first wanted a doctor to take the blood, didn't he?

A. Well, he asked where the doctor was.

Q. And the trooper told him that he could – that you were qualified to take it?

A. And that there would not be a doctor.

Q. And he consented to it?

A. Well, at first he said he refused, and then the trooper told him that he had no choice, and then he allowed me to draw the blood.

Q. Was there anything that you saw about Bob Quigley that evening that led you to believe that his [269] faculties were impaired?

A. No, sir.

MR. FIORENTINO: I have no further questions. Thank you, Jean.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Were you looking for any signs of impairment?

A. No, sir, I wasn't. I had no knowledge about the circumstances or anything.

MR. WILLIAMS: Thank you, Ms. Bell.

THE COURT: Thank you, ma'am.

MR. FIORENTINO: Let me ask one thing.

RECROSS-EXAMINATION

BY MR. FIORENTINO:

Q. Ms. Bell, when you take this test or draw the blood, though, you're right at this individual's arm?

A. That's right.

Q. I mean, you're close to them?

A. That's right.

Q. And notwithstanding being this close, you had no reason to believe that he was under the influence?

A. No, sir, I didn't.

* * *

TESTIMONY OF ROBERT DANIEL SMITH

[298] Q. Did you see the defendant at the scene at all, Mr. Quigley?

A. Yes.

Q. What was he doing?

A. He was at the rear of his vehicle and he or – I approached him or walked over in that direction, and he asked me for a cigarette.

[299] Q. Did you remember anything unusual about his attitude at that time?

A. No.

Q. Okay. What state of mind would you say that he was in?

A. Normal, I guess.

Q. Now, did you ever hear him make any statements as to how or who caused the accident?

A. I believe – I believe the way it was said that he had just had an accident.

Q. Okay. Was that what he said?

A. Right, uh-huh.

Q. You heard him say that?

A. Right.

MR. WILLIAMS: Thank you.

CROSS-EXAMINATION

BY MR. FIORENTINO:

Q. Mr. Smith, you were out there with Mr. Quigley for some period of time? I mean, I'm talking about, 10, 15, 20 minutes, you and your wife and he were together?

A. Right.

Q. Did you notice anything about him as far as his walk, his talk, how he smoked that cigarette, how he stood, that would suggest to you that he was under the influence of alcohol?

[300] A. No, sir. As I said, it was just very normal, everything seemed to be very normal, just like nothing had ever happened.

Q. And was there anything that suggested to you that he was – that he was physically impaired, I mean, did not have full use of his faculties?

A. No.

Q. He asked you for two cigarettes, I believe, did he not?

A. Yeah, right.

Q. So he was smoking?

A. Right.

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TESTIMONY OF JOSEPH SIMMONS

[731] Q. Would you state your name and your address, please.

A. Joseph Simmons, Pensacola Beach.

Q. Mr. Simmons, have you been in this courtroom at any time during this trial Thursday or Friday when any testimony has been taken?

A. No.

Q. Do you know the defendant, Robert, Bobby Quigley, in this action?

A. Yes, I do.

Q. Are you aware that he was involved in an automobile accident on September 29, 1990, Pensacola Beach, on Fort Pickens Road?

A. Yes.

Q. Did you go to the scene of that accident?

A. Yes, I did.

Q. Did you have an opportunity to see Bobby Quigley there at the accident?

A. Yes.

Q. And did you talk to him at the accident scene?

A. I spent approximately 30 minutes or longer with him.

Q. And how close to him did you get?

A. Next to him.

Q. Did you see anything unusual about him as far as [732] his walk, his talk, his speech?

A. He appeared to be perfectly sober to me.

Q. Anything unusual about the fact – his ability to make judgments that you noted at that time?

A. None.

Q. How long have you known Bobby Quigley?

A. Approximately two-and-a-half years.

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## TESTIMONY OF ESCAMBIA COUNTY SHERIFF, DEPUTY, ROGER GRICE

[747] Q. Mr. Grice, would you state your name and your address, please.

A. Roger Grice, 7447 Mobile Highway.

[748] Q. And at this time where are you employed?

A. Courthouse.

Q. And are you a member of the Escambia County Sheriff's Department?

A. I was a deputy for seven years, and I have been a deputy here at the courthouse for the past two years.

Q. And on September 29, 1990, were you on duty as a deputy at Pensacola Beach?

A. Yes, sir.

Q. Are you aware of an accident on Fort Pickens Road where an individual and pedestrian was struck and he died as a result of the accident?

A. Yes, sir.

Q. Did you go to the scene of the accident?

A. Yes, sir.

Q. Did you see a lady by the name of Mrs. Hawley?

A. If that's the victim's wife, yes, sir.

Q. The victim's wife, assume it's the victim's wife, yes. Did you have an opportunity to form an opinion whether or not Mrs. Hawley had been drinking or was under the influence of alcohol?

A. Well, when I first walked up there, she was hanging on to her husband, and I asked her to move, and she yelled at me. And, yes, sir, I could smell it on her.

Q. Did you have an opinion whether she was under [749] the influence?

A. Of how far she was under, I don't know, but, yes, sir, she was I assume.

Q. And did you have an opportunity to see Mr. Quigley?

A. Yes, sir, he was standing over in front of his truck just leaning up against his truck.

Q. Did you have an opportunity to observe him?

A. Well, he was about 50 yards away, and I just observed him standing there waiting on the troopers to get there.

Q. Anything – did you talk to him at all as far as he was waiting for the troopers?

A. No, sir.

Q. Did you observe him standing there the whole time?

A. Yes, sir, he stood right there in front of his truck.

Q. From what you saw, was there any reason – did you see anything that would indicate to you that he was unsteady on his feet?

A. No, sir.

Q. Did you see anything that would indicate to you that he could not walk properly, run properly?

A. No, sir, I didn't see him doing any of those [750] things. He was just leaning against his truck.

Q. You had no reason to believe that he was under the influence of alcohol?

A. No, sir.

Q. When you arrived at the scene, were you one of the first officers on the scene?

A. Myself and another officer, yes, sir.

Q. Would you tell the ladies and gentlemen, was it dark, light?

A. It was dark and the wind was blowing really hard.

Q. Was there a storm coming up?

A. Yes, sir.

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## TESTIMONY OF FLORIDA HIGHWAY PATROL HOMOCIDE INVESTIGATOR STEVEN R. BEVIS

[338] Q. Now, how did you become aware of – well, when did you first notice Mr. Quigley, the defendant?

A. Shortly after I arrived at the scene.

Q. And do you recall smelling his breath at any point?

A. As soon as the first time I talked to him, I detected an odor of alcoholic beverages, yes.

Q. How strong would you say that odor was?

A. It was very noticeable.

Q. Did you see – how was he on his feet?

A. When I first observed him, he was standing, leaning, propped up against the back of the vehicle.

Q. Whose vehicle?

A. I am not sure. It may have been his own vehicle.

Q. Did you see him walking at any point?

A. Yes, sir. When he walked, I detected a slight unsteadiness on his feet.

Q. Did you see any other signs of intoxication by alcohol?

A. Not that were terribly noticeable, no, sir.

[339] Q. All right. Based on what you observed about him, were you able to form an opinion as to whether he was under the influence of alcohol?

A. Well, the unsteadiness on his feet gave me an indication that he probably was impaired, yes, sir.

* * *

[354] Q. (By Mr. Williams) All right. Let me switch to this. Now, based on everything you heard and what you were able to observe, did you reach any opinions as to whether the driver of the truck, the defendant, may have been impaired solely because of how the accident occurred?

A. Solely because of how the accident occurred?

Q. Yes.

A. It gave me a very strong indication that he was impaired, yes, sir.

Q. Would you tell the jury everything that went into that decision on your part.

A. First, both pedestrians were dressed in white. Secondly, at least two other drivers had observed them in the roadway and had been able to avoid them. Third, there was no evidence of any attempt to stop or avoid striking the pedestrians. And four, the distance between the point of collision and the distance to the final rest distance of 170 feet in a 30-mile-an-hour speed zone did not indicate any kind of rapid reflexes or quick reflexes or attempt to stop.

* * *

[361]Q. You say you consulted with the State Attorney's Office before you filed charges on this matter?

A. Yes, sir.

Q. Why did you consult with them?

A. I normally do in certain terms – certain questions.

Q. What were the questions?

A. No. 1 had to do with the pedestrians being on the roadway.

Q. What significance – why were you concerned about that?

A. I thought that also contributed to the cause of the collision.

Q. Tell me – tell the ladies and gentlemen of the [362]jury why you thought that contributed to the collision?

A. Well, first of all, it's a violation of state law to walk on the roadway with your back to traffic.

Q. Why else? Any other reason?

A. I just thought that walking on the roadway after dark contributed to it, or in a low light condition, let me put it that way.

Q. What else did you think contributed to this?

A. To the collision?

Q. Yes.

A. Mr. Quigley's impairment.

Q. Tell the ladies and gentlemen of the jury what evidence you saw that indicated to you that Mr. Quigley was impaired from the evidence at the scene of this accident.

MR. WILLIAMS: Your Honor, asked and answered.

MR. FIORENTINO: I'm on cross-examination, Your Honor.

THE COURT: I am going to allow the answer.

THE WITNESS: First of all, there was no evidence of any attempt of evasive action prior to the collision.

Q. (By Mr. Fiorentino) How do you know that?

A. I said there was no evidence of it. I didn't see any evidence of it.

Q. How does that indicate to you – all right. [363] What evidence would you be looking at? I am sorry. I asked an improper question. What evidence would you be looking for evasive action?

A. Tire marks where he attempted to stop, alter his direction, leave the roadway.

Q. There were no tire marks?

A. None that I could find, no, sir.

Q. You did determine that this truck had disk and drum brakes?

A. Yes, sir.

Q. Disk on the front and drum on the rear?

A. Yes, sir.

Q. How did you determine that?

A. I looked.

Q. Did you determine if this truck had an ABS, anti-locking brake system?

A. No, sir, I did not.

Q. Why did you not determine that?

A. I don't know what ABS or anti-lock brakes look like.

Q. Do you know what anti-lock brakes do?

A. Yes, sir, I do.

Q. Tell the ladies and gentlemen of the jury how they work.

A. Normally on a pickup truck, they –

[364] Q. Tell them how they work, not what on – normally on a pickup.

A. They work to prevent tires from skidding.

Q. And if an anti-lock breaking system is working properly, will the vehicle skid?

MR. WILLIAMS: Objection. I don't think a predicate has been laid.

THE WITNESS: Not on the wheels –

THE COURT: Wait just a minute.

MR. WILLIAMS: I don't think this witness can give an expert opinion. I don't think a predicate has been laid.

THE COURT: Sustained.

Q. (By Mr. Fiorentino) Is part of your background foundation in homicide investigation in knowing about skid marks, knowing how tires skid, knowing how far they will skid?

A. Yes, sir, I know how to work with that.

Q. Is this part of your training?

A. Yes, sir.

Q. Is part of our training as a homicide investigator to know about various brake systems, disk brakes, drum brakes, anti-lock brakes?

A. I have not been trained in anti-lock brakes, no.

Q. Have you been trained in braking systems?

A. Yes, sir.

[365] Q. This is part of your training?

A. Yes, sir.

Q. Are the various breaking systems important, how they work, what they do, in analyzing an investigation, analyzing a traffic accident when you're trying to determine what happened?

A. Yes, sir, they are.

Q. Is it important whether there are or there are not skid marks?

A. Yes, sir.

Q. Is it important to know whether a vehicle will

make skid marks if it's being stopped in a panic fashion?

A. Yes, sir.

MR. FIORENTINO: If I could, Your Honor, I would like to ask –

Q. (By Mr. Fiorentino) Do you know what anti-lock brakes to?

A. Yes, sir. I answered that awhile ago.

Q. And if a vehicle has anti-lock brakes on it, do you know if it will leave skid marks?

MR. WILLIAMS: Objection, calls for speculation.

THE COURT: I sustain the objection.

Q. (By Mr. Fiorentino) Did you make any type of test with this vehicle that you saw on the scene to determine if it would leave skid marks in a panic situation, in a panic [366] braking?

A. No, sir.

Q. Did you make a test with any other vehicle – a 1988, I think you said, GMC pickup?

A. Yes, sir.

Q. To determine if it will leave skid marks if stopped in a panic situation?

A. No, sir, I didn't have access to one.

Q. Did you make any request of Mr. Quigley to provide the truck to make tests to see if it would leave skid marks?

A. No, sir.

Q. Did you make any request of Quigley Electric to provide the test of the truck to make test to see if it would leave skid marks?

A. No, sir.

Q. All right. Now, so you don't know whether this truck would skid or not, leave skid marks or not, do you?

A. No, sir.

Q. Now, you say that you – did you tell the State

attorney that when you discussed that with them, you didn't know whether this truck would skid or not?

A. No, sir.

Q. Did you tell them you didn't know whether it would leave –

[367] MR. WILLIAMS: Objection, improper, hearsay.

THE COURT: Overruled.

Q. (By Mr. Fiorentino) Did you tell them you didn't know whether going out there at Fort Pickens and using this truck in a panic stop, whether it would leave skid marks or not?

A. No, sir.

Q. Now, you also say that you based your decision that Mr. Quigley was impaired on the distance it took to stop the truck and park, stop the truck, assuming that it stopped where it was parked from the point of impact up here to where you have marked on the exhibit, on this exhibit, I think you have said this was 170 feet?

A. Yes, sir.

Q. And you made your determination that he didn't attempt to stop, it took him this period of time to stop and, therefore, it's an excessive distance to stop, didn't you?

A. Yes, sir.

Q. Now, do you know – did you know then whether Mr. Quigley had attempted to stop the truck or did stop the truck prior to where Mr. Hawley came to rest?

A. No, sir.

Q. Did you attempt to make any determination in that regard?

A. I was not able to get a statement from Mr. [368] Quigley.

MR. WILLIAMS: I would object and ask that the Court strike that.

THE COURT: Approach at side bar, please.

(Bench conference off the record)

THE COURT: Ladies and gentlemen, we're going to take a break earlier than we anticipated right now. The jury will be given a 15-minute recess. Thank you.

(Jury out)

THE COURT: Mr. Fiorentino, you were saying.

MR. FIORENTINO: Judge, I'm afraid we're going to have to ask for a mistrial. There was nothing here that was asked about him trying get a statement from Mr. Quigley. I asked if he tried to make a determination whether Mr. Quigley had stopped the truck, and the officer comes out and says I have been unable to get a statement. I think this again is evidence to the jury regarding his right to remain silent.

THE COURT: Mr. Williams.

MR. WILLIAMS: Could I ask that the response be read back?

THE COURT: Yes, sir, I think that's appropriate.

(The portion requested was read back)

[369]MR. WILLIAMS: You were – I don't think it indicates that he refused to make a statement, only that he was not able to get one, and that's consistent with everything that was said so far, and he did the accident investigation. We haven't gotten into at all any questioning – attempts to question Mr. Quigley. And furthermore, Mr. Fiorentino – this is in the context of him asking what you told the State attorney. He wants to get into specifics about what was in the officer's mind, and we'd argue that this does not rise to a level of clear Fifth Amendment issue before the jury.

THE COURT: You have 30 minutes to show me why it does not, Counsel. This Court is inclined to

find that it is a comment on the defendant's right to remain silent. I am going to do some independent research during the next 30 minutes, and I'll give you an opportunity to do the same. We'll meet back here and I'll be glad to consider what you find. And would you – I am going to ask the court reporter to give me the specifics again of the question asked and the response of the witness, and Court is going to stand in recess for 30 minutes.

(Recess)

* * *

[376]THE COURT: The Court finds it was not invited, that the questions as I have read are not capable of interpretation which would be that they somehow invited the response that this officer gave, I was not able to get a statement from Mr. Quigley. The question was did you attempt to make any determination in that regard, that is, whether Quigley had attempted to stop the truck or did stop the truck. Any number of responses could be given other than a comment on the defendant's right to remain silent. The response that was given, "I was not able to get a statement from Mr. Quigley," must be viewed in light of the test which has been enunciated in *State vs. Kinchen* reported at 490 So.2d 21 and *State v. Thornton* reported at 491 So.2d 1143 by the Florida Supreme Court and reaffirmed time and again. The test is whether that comment, the response of this officer, is fairly susceptible of [377] being interpreted by a jury as a comment on the defendant's failure to testify or right to remain silent. And in the context that it was given, I must find that it is fairly susceptible of being interpreted by the jury as a comment on the defendant's right to remain silent.

I sustain the objection. I will take under advisement the request for a mistrial, and I will consider the State or the defendant's request for a curative instruction, and if so, what you may suggest that a curative instruction would be. The State has requested it. Does the defense request it?

MR. FIORENTINO: I don't have a requested curative instruction, Your Honor. It seems to me – I don't have one prepared, obviously. I think the most we can do to minimize this would be just that the jury is instructed to disregard any response – any comment of the trooper regarding ability to get information from Mr. Quigley. I don't mean to phrase it that way. We're going to have to refine it. I don't think there is one in the standard jury. I don't believe there is.

THE COURT: There is a comment in the standard jury instructions as given only if the defense requests it which has to do with the defendant's exercise –

MR. FIORENTINO: Right to remain silent.

[378]THE COURT: – Right to remain silent . . Look it at the first paragraph of it.

MR. FIORENTINO: How are we going to tie this in with what has just transpired? Pete, do you want to come forward, please?

THE COURT: I simply have to advise the jury that the last response of the witness is to be disregarded, and not to consider it in any way whatsoever as any evidence in this matter or inference of guilt.

MR. FIORENTINO: My position is going to be on this – I guess it will have to be that it's – that it has vitiated this thing to the extent that I don't believe a curative instruction would be adequate. I will just ask for a mistrial. And whatever the State proposes as a curative instruction, I will object to it.

THE COURT: State, do you request a curative instruction, and if so, what?

MR. WILLIAMS: Well, I think any specific reason why to disregard it would just draw attention to it, so I just recommend that the jury disregard the last answer of the witness and, of course, we wouldn't read it back.

THE COURT: Okay. The defendant is of the [379] opinion that no curative instruction would help. The State would request that I give none other than to advise the jury to disregard the last comment of the witness, and that's what the Court will do. Again, I have taken under advisement the motion for mistrial.

MR. WILLIAMS: Your Honor, is there another standard instruction not becoming a witness, but the right to remain silent. I seem to recall –

MR. FIORENTINO: That's one that has to be given when requested by the defense.

THE COURT: That's in the pretrial instructions.

MR. FIORENTINO: That's if requested, and we're not requesting any at this time.

(Jury present)

THE COURT: Thank you, ladies and gentlement, please be seated. Ladies and gentlemen, I apologize for the long delay. That 15-minute recess turned into almost an hour, and I certainly beg your indulgence. I was taking some time to study some matters of law, and I just appreciate that you gave me the opportunity to do that. At this time please listen carefully to what I'm about to say, and then we're going to move on and continue the trial in this matter. Immediately before the recess during the examination of this particular [380] witness. the witness made a comment in the –

and the last comment the witness made I specifically ask you to disregard it, do not consider that comment in any way in your deliberation, strike it from your consideration completely. Thank you.

MR. FIORENTINO: Thank you, Your Honor.

Q. (By Mr. Fiorentino) Officer Bevis, what attempt did you make to learn whether Mr. Quigley had stopped his vehicle prior to the spot where Mr. Hawley came to rest?

A. I had no indication that he had stopped or had not. I made no attempt.

Q. You made none?

A. I had nobody to ask.

* * *

[389] Q. (By Mr. Fiorentino) Officer Bevis, you have no indication that speed is involved in this accident do you?

A. No, sir.

Q. As far as it appears to you, Mr. Quigley was driving the speed limit or close to the speed limit?

A. Reasonable close, yes, sir.

Q. You are not basing any of your opinion that he was impaired on the speed limit?

A. No, sir.

* * *

Q. (By Mr. Fiorentino) Two or three weeks later you did learn there was a red sports car?

A. From my other source, yes, sir.

Q. And did you attempt to find the lady in the red sports car?

A. All I had was a red sports car, sir. I had no idea what kind of car to look for. No, sir, I didn't attempt to find it.

Q. You didn't look at all? Would it be significant in your report to find an eyewitness to this investigation – to the accident?

A. Yes, sir, it would. The information I had though was not that she was an eyewitness.

Q. You did not check it, though?

A. I was told she had allowed Mrs. Hawley to sit in her car.

Q. But you never tried to find the lady?

A. I had no idea what kind of car to look for.

Q. You did not ask what kind of car to look for?

A. The person told me he didn't know, a red sports [393] car.

Q. Did you ask other persons that were at the scene of the accident?

A. By that time, sir, the other person at the scene of the accident were gone.

Q. Mrs. Smith was still here, Mrs. Ursula Smith was still here in Pensacola Florida, wasn't she?

A. Yes, sir.

Q. Did you ask her?

A. I asked her, yes, sir, and I believe she said she didn't

know anything about it.

Q. Didn't know anything about it?

A. To the best of my recollection.

Q. Did you ask Mrs. Irwin about anybody in the red sports car?

A. I don't recall whether I did or not.

Q. If Mr. Quigley had stopped his truck prior to the point that Mr. Hawley came to rest, this would have had a significant influence on your determination whether Mr. Hawley was – Mr. Quigley was impaired or not, wouldn't it?

A. Yes, sir.

Q. If there had been oncoming traffic, this would have had a significant influence on whether or not Mr. Quigley could have swung around where Mr. and Mrs. Hawley were walking and going in the left lane, wouldn't it?

[394] A. It would have had a bearing, yes, sir.

Q. Would it have had a significant bearing?

A. Yes, sir.

Q. Tell the ladies and gentlemen of the jury what bearing this would have.

A. It would mean that he could not go completely over in the opposite lane to avoid pedestrians without striking oncoming traffic.

Q. He would have a head-on?

A. Yes.

Q. And if Mr. Hawley is four feet, four inches out there in the road at the point of impact, Mr. Quigley would have had to have gone in the opposite lane to avoid him, wouldn't he?

A. Partially, yes, sir.

Q. And he would have had a head-on with that Corvette automobile?

A. Depending on how close it was, yes, sir.

Q. Assuming it's a hundred – somewhere that is 150 feet away at the point of impact, time of impact?

A. No, sir, I think he could have gone around the person at 30 miles an hour.

Q. On around and gotten back in?

A. At four feet, four inches, he would not have had to go completely into the opposing lane.

[395] Q. He would have to go into the other lane in oncoming traffic?

A. Partially, yes, sir.

Q. He has to make that decision very quickly, doesn't he?

A. Yes, sir.

Q. If he is going to do it, in essence he has to decide whether he is going to brake or try to go around and has to make the determination where that oncoming car is and can I swing into a lane with the car coming up there and take the chance of any head-on, he has to make that decision in just zip, doesn't he?

A. Yes, sir.

Q. If he had stopped before coming – before where Mr. Hawley was, this would indicate to you that his reflexes were normal, wouldn't it?

MR. WILLIAMS: Objection, unclear question. What does he mean by where Mr. Hawley was?

MR. FIORENTINO: Or Mr. Hawley came to – let me rephrease it, Your Honor.

THE COURT: Thank you.

Q. (By Mr. Fiorentino) If Mr. Quigley had stopped prior to where Mr. Hawley had come to a rest, had stopped his vehicle, this would indicate to you that his reflexes were normal, weren't they, his braking reactions?

[396] A. More normal than they appeared to be at face value.

Q. At face value. And if he did not go into that oncoming lane of traffic to prevent having a head-on, this would indicate to you that his reflexes were normal also, wouldn't it?

A. I still think he could have gone partially into the lane and got back in if the car is 150 feet away at 30 miles an hour.

Q. If the other car is coming at 30 miles an hour and he is coming at 30 miles an hour, they are approaching at 60 miles an hour?

A. Yes, sir.

Q. The other car is coming 25 miles an hour and he's going 30 miles an hour, they are approaching at 55 miles an hour.

A. Yes, sir.

Q. At that point you have 55 miles an your, you have — or 60 miles an hour, you have 88 feet per second you're going to travel, aren't you?

A. Yes, sir.

Q. In a second they would have had a head-on if he swung in there, wouldn't he?

A. Yes, sir.

Q. One thousand and one, that's essentially what a [397] second is.

A. (Witness nods head in the affirmative).

* * *

[403] Q. Now, you didn't give Mr. Quigley any of the normal — you testified, I think that normally you give finger-to-nose type test, physical test when you suspect a person of being DUI?

A. Yes, sir.

Q. You do that alongside of the road?

A. Yes, sir.

Q. And you testified on this evening that it was [404] congested, there was a lot of people there?

A. Yes, sir.

Q. And you didn't think you should do it there?

A. That's right.

Q. Why isn't it you didn't think you should take him over to one of the parking lots alongside there and get him off the road and give him a physical test?

A. I had a lot of things to do there.

Q. Well, what – what was more important than trying to make a determination as to whether Mr. Quigley may have been under the influence? You were thinking about bringing criminal charges against him, you're thinking about, you know, you have an individual – you were thinking about bringing criminal charges against him at that point, weren't you?

A. It was a possibility, yes, sir.

Q. You knew there had been a death?

A. Yes, sir.

Q. You knew that criminal charges could be very serious, subject to serious penalties, right?

MR. WILLIAMS: Objection, Your Honor, improper mentioning.

THE COURT: Objection sustained.

Q. (By Mr. Fiorentino) You knew criminal charges were serious, didn't you?

[405] A. Yes, sir, all criminal charges are serious.

Q. What was more important than making some determination, under the standard procedure, to run physical tests right then and if you suspect the individual is under the influence?

A. Based on the information I had at hand, I had already formulated an opinion that he was under the influence.

Q. You had already formulated it?

A. Yes, sir.

Q. And when you first saw him, there was nothing to indicate to you that he was under the influence, was there?

A. When I first saw him, he was propped up against the back of a truck, no, sir.

Q. My question is when you first saw him, Officer Bevis – would you please –

MR. FIORENTINO: Judge, I would like to ask that Officer Bevis be directed to answer the questions.

THE COURT: If you would ask your question and I'll ask the witness to respond to it directly.

Q. (By Mr. Fiorentino) My question to you, Officer Bevis, is when you first saw Mr. Quigley, you were not under the opinion or – that he was under the influence, were you?

A. No, sir.

Q. You did not have an opinion that he was under the influence?

[406] A. No, sir.

Q. You did not have an opinion that his faculties were at all impaired?

A. Not at first, no, sir.

Q. All right. And even if an individual suspects – an officer suspects that somebody may be under the influence and his faculties are impaired, the normal procedure is to run the physical tests at the scene, the finger to nose, walking the line, a balance test, isn't it?

A. If it can be done in safety, yes.

Q. There was no reason this could not be done in safety, was it?

A. Not there on the roadway it couldn't.

Q. You could have taken him in a parking lot, couldn't you?

A. Yes, sir.

Q. You didn't do it?

A. No, sir.

Q. Normally someone is required to be videotaped if there is a question that they are under the influence?

A. If videotape is available, yes, sir.

Q. And you say in this case it was back at the station?

A. No, sit, back at the Escambia County jail.

Q. I mean Escambia County jail. Excuse me. But [407] you did not ask Officer Smith to run any physicals on Mr. Quigley either, did you?

A. No, sir, I did not.

Q. And Mr. Smith took Mr. Quigley off where he could have run them at any place, couldn't you?

A. Yes, sir.

Q. You did not ask Officer Smith when he finished with the blood test or before when he finished with the blood test, for example, to take Mr. Quigley to the Escambia County Corrections Institute and have him videotaped, did you?

A. No, sir, I asked them to bring him back to the scene.

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## TESTIMONY OF HAL EASTER, F.D.L.E. CRIME LABORATORY SUPERVISOR

[521] Q. Mr. Easter, I will take you back just a little bit. When you received the blood kit that you began to describe your work on, did it have any name written on it?

A. Yes, sir, it did.

Q. What was the name written on it?

A. It was the same name that was on the form that [522] accompanied it, which was Robert Erle Quigley.

Q. Where else was that name written on that you found?

A. It was on the, excuse me, inner plastic box and also on the tubes themselves, the blood tubes themselves.

Q. How many tubes were there in total?

A. Two tubes.

Q. What was the color of the stoppers on those tubes?

A. They were gray.

* * *

[526] Q. (By Mr. Williams) Mr. Easter, what were the results of the blood alcohol level on that blood you tested?

A. I determined a blood alcohol level of a .19 grams of ethyl alcohol per hundred milliliters of specimen.

Q. Okay. So the jury understands, compared to the legal limit of .1, what are you saying?

MR. FIORENTINO: I am going to object, Judge. That's testified that – the prosecution is testifying.

[527] THE COURT: Okay. Sustained.

MR. WILLIAMS: Yeah. Thank you.

Q. (By Mr. Williams) Can you restate it in percentage of alcohol in the blood?

A. It's a .19 grams per 100 milliliters.

Q. Okay. Thank you. Is that also known as a .19 percent blood alcohol level?

A. Yes, sir, it could be called that.

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## TESTIMONY OF JAMES D. ANDERSON, STATE'S CONSULTING FORENSIC ENGINEER

[450] Q. (By Mr. Williams) I wonder if you could for us give us your expert opinion summarizing everything you said.

A. It is my opinion that Mr. Quigley was going down this road in a speed which exceeds the speed limit out there on the beach and that he had ample and sufficient time and distance to avoid it – hitting Mr. Hawley.

* * *

[475] Q. You were provided by Mr. Quigley, Quigley Electric the use of that truck, to use that truck to run tests, weren't you?

A. Yes.

Q. You took that truck out and you tried to skid it, didn't you?

A. Yes.

Q. You tried to skid it at 30 miles an hour and you were driving, is that correct?

A. That's correct.

Q. You tried to skid it at 30 miles an hour, didn't you?

A. I thought it was 30.

Q. Did you do one at 30?

A. 30, 35 and 40, right.

Q. You did one at 45, too, didn't you?

A. Yes, it was only –

Q. You did one at 30, 35, 40 and 45 miles an hour?

[476] A. No, there was three tests, 45, 40 and 35. I didn't run one at 30 to my memory.

Q. Did you really jump on the brakes of that truck?

A. Yes, sir.

Q. Did you make a panic stop?

A. Yes, sir.

Q. Did it skid?

A. No, sir.

Q. Did it go straight?

A. Yes.

Q. You got out of that truck and parked it and then you walked back up the road and you got down on that highway and looked to see if you could see any skid marks, didn't you?

A. Yes.

Q. And you didn't see any, did you?

A. No.

Q. Well, the fact that there are no skid marks with that truck – with this accident, rather, is of no significance whatsoever in the analysis of this accident, isn't it?

A. That's correct, not taken into consideration, right.

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## TESTIMONY OF BOBBY VINCENT SMITH, DEFENDANT'S ACCIDENT RECONSTRUCTION SPECIALIST

[613] Q. Go ahead. What opinions do you have?

A. My opinion is this, that Mr. Quigley perceived and delayed just this time and reacted very fast to the situation and came to a stop prior to the body and pulled around. He had enough distance here because of the truck to pull around. It's very difficult to see people at night facing oncoming light. There is some testimony that some other people went around them, but there were no cars coming, so there is no bank light, and that's what you need to do to see the people when you don't have an oncoming car and clear path of lane to go around. The left lane was not open for Mr. [614] Quigley to go around.

* * *

TESTIMONY OF THERESA LYNN WHITE

[91] Q. And when you got outside, where was Robert Quigley?

A. He was at the scene of the accident.

Q. Do you see Robert Quigley in the courtroom today?

A. Yes, I do.

Q. Just for the record, point him out for us, please.

A. He is over there.

Q. The man next to Mr. Fiorentino?

A. Yes, sir.

Q. Thank you.

MR. WILLIAMS: May the record reflect the [92] witness identified the defendant, Your Honor?

Q. (By Mr. Williams) Now, did you ever have a chance to smell his breath during any of these events you described?

A. No.

Q. Are you able to say whether or not the odor of alcohol was on his breath?

A. No, I am not.

Q. Did Bobby Quigley exhibit any signs of the flu to you?

A. Not that I remember.

MR. WILLIAMS: Your Honor, that's all I have at this time. I'd like to recall this witness in a minute, if I may.

THE COURT: Do you wish to cross-examine now?

CROSS-EXAMINATION

BY MR. FIORENTINO:

Q. When you saw Bobby in the townhouse when you came back, this is between 5:00 and 6:00, and then up

until the time he left with Allen to go get his truck, did you notice anything that would suggest to you that he was under the influence of alcohol?

A. No.

Q. When he came running back into the house and called 911, you say he was there about a minute and he was [93] excited and appeared to be upset or in shock?

A. Yes.

Q. And then he went running back out and went to the scene where his truck was, the scene of the accident?

A. Right.

Q. You went over there?

A. Yes, I did.

Q. About how long did you stay with Bobby over there?

A. I stayed with him until he left to go – when the police officers took him off.

Q. During the time that you were with him over there, did you notice anything that would indicate to you, and I'm talking about his walk, his talk, how he handled himself, the way he stood, that would indicate to you that he was under the influence of alcoholic beverages?

A. No.

* * *

TESTIMONY OF WILLIAM ALLEN MORPHEW

[98] Q. Mr. Morphew, when Bobby Quigley came back in to make this phone call, was he upset or did he appear that something had happened?

A. Yes, I'd say he was upset and shaken up, yes.

Q. You said you didn't notice anything out of the ordinary. And I have talked to you before about this. In regard – did you have a chance when you took him down to get the truck and when you were with him in

the apartment before you two left, did you have an opportunity to observe whether or not he appeared to be under the influence of alcohol?

A. Yes, I had – I talked to him, you know, five to [99] ten minutes. I wanted to take a shower and go ahead and do what I had to do that night, but I also had to drop off some videos and so – I didn't stay at the house very long. Like I said, it wasn't five or ten minutes. And then as we were driving back to the boardwalk, we talked, and I really didn't notice anything that would make me think that he had been drinking.

Q. When he came back in – I know that he was – he came back in and dialed very quickly when you were back in there. Was there anything then other than the fact that he was upset and shaken to make you believe that he was under the influence of alcohol or any substance?

A. No.

* * *